87-179

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

TONY SCOTT TRUCKING, INC. - - - Petitioner

versus

THE NATIONAL LABOR RELATIONS BOARD - - - - - - - - Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Whether this Court should resolve a conflict among the U. S. Courts of Appeals regarding the standard of judicial review applicable to election certification cases before the National Labor Relations Board.

2. Whether this Court should resolve a conflict among the U. S. Courts of Appeals regarding the standard of proof necessary to justify overturning Board certifications of election results.

3. Whether this Court should rectify the failure of the U. S. Court of Appeals for the Sixth Circuit to apply the standard for judicial review established by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

4. Whether this Court, in light of the recent holding of the National Labor Relations Board in *Davlan Engineering, Inc.*, 283 N.L.R.B. No. 124 (April 30, 1987), should decide an important federal question affecting union agency determinations under *NLRB* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973).

DESIGNATION OF CORPORATE RELATIONSHIPS

Tony Scott Trucking, Inc., as Petitioner in this proceeding, states that:

This is its original Designation of Corporate Relationships.

Tony Scott Trucking, Inc. is not owned by any parent corporation.

Tony Scott Trucking, Inc. does not have an ownership interest in any subsidiaries as defined in Sup. Ct. R. 28.1.

Tony Scott Trucking, Inc. does not have any affiliates.

Dated: July 27, 1987

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No.

TONY SCOTT TRUCKING, INC. - - - *Petitioner*

v.

THE NATIONAL LABOR RELATIONS BOARD - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Tony Scott Trucking, Inc., respectfully prays that a Writ of Certiorari issue to review the Decision of the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") entered in this proceeding on April 28, 1987.

OPINION BELOW

The Decision of the Sixth Circuit is recorded at ___ F. 2d ___ (6th Cir. 1987), Nos. 86-5115/5262 (6th Cir. April 28, 1987) (granting petition for enforcement), and is set out in the Appendix hereto (App., pp. 1a-10a).

JURISDICTION

Petitioner brought this suit pursuant to 29 U.S.C. §160(f) in order to seek review of the Decision and Order rendered by the National Labor Relations Board

(the "Board") on December 31, 1985. Respondent filed a cross-application for review pursuant to 29 U.S.C. §160(e) and (f), seeking a judgment enforcing Respondent's previous Order. The Decision of the Sixth Circuit was entered on April 28, 1987. This Petition was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Section 2(13) of the National Labor Relations Act, 29 U.S.C. §152(13), provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 7 of the National Labor Relations Act, 29 U.S.C. §157, is set forth in the Appendix (App., p. 36a).

Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5), provides as follows:

> §158. Unfair Labor Practices
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;
>
> . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

Sections 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. §160(e) and (f), are set forth in the Appendix (App., pp. 37a-39a).

STATEMENT OF THE CASE

Petitioner, Tony Scott Trucking, Inc. (the "Company") is a corporation engaged in the hauling of materials, supplies and equipment used by other companies in performing road construction work. On July 11, 1984, General Drivers, Warehousemen and Helpers, Local No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the "Union"), filed a Petition for Certification of Representative (the "Petition") (Case No. 9-RC-14524).

Pursuant to a Stipulation for Certification Upon Consent Election approved on August 9, 1984 by the Regional Director for the Ninth Region of the Board (the "Regional Director"), an election by secret ballot was conducted among the Company's employees on September 6, 1984. The election was conducted under the supervision of the Regional Director within the following unit:

> Included: All full-time and regular part-time truck drivers and mechanics employed by the Employer at its Barren River Rd., Bowling Green, Kentucky facility but excluding all office clerical employees and all professional employees, guards

and supervisors as defined in the Act and all other employees.

The election was conducted on September 6, 1984 and produced the following results:

Approximate number of eligible voters	35
Number of void ballots	0
Number of votes cast for the Union	19
Number of votes cast against participating labor organization	14
Number of valid votes counted	33
Number of challenged ballots	2
Valid votes counted plus challenged ballots	35

On September 13, 1984, the Company filed timely objections to the election (the "Objections") with the Regional Director pursuant to Section 102.69 of the Board's Rules and Regulations.

After the Objections were filed, the Regional Director conducted an investigation and on October 10, 1984, recommended to the Board that a hearing be held to resolve issues raised by the Company's Objections Nos. 1 and 2. In both Objections, the Company argued that the conduct of Union agents unlawfully coerced employees in their right to refrain from union activities or membership and created an atmosphere which destroyed the "laboratory conditions" necessary to the conduct of a valid representation election. *See, e.g., General Shoe Corporation,* 77 N.L.R.B. 124, 127 (1948), *enforced,* 192 F. 2d 504 (6th Cir. 1951), *cert. denied,* 343 U. S. 904 (1952).

On October 30, 1984, a Hearing was conducted in Bowling Green, Kentucky, before a Hearing Officer. The issue before the Hearing Officer was whether persons endowed with authority as agents of the Union committed misconduct sufficient to set aside the election. The Company maintained that these Union agents promised to waive initiation fees for employees who signed pre-election authorization cards, threatened violence and issued racial slurs thereby unlawfully coercing and interfering with the employees' free choice in the election. *NLRB* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973).

On November 14, 1984, the Hearing Officer issued her Report on Objections to Election and Recommendations to the Board (the "Hearing Officer's Report") (App., pp. 22a-35a).

On November 26, 1984, the Company filed with the Board timely Exceptions and a Brief in Support of Exceptions to the Hearing Officer's Report. On May 10, 1985, the Board adopted the Hearing Officer's Report, issued a Decision and Certification of Representative and ordered the Company to bargain with the Union (App., pp. 20a-21a).

In keeping with its firm conviction that the Union was not the duly and lawfully elected representative of its employees, the Company declined to bargain with the Union. On August 13, 1985, the Union filed a Charge with the Board alleging the Company had violated Section 8(a)(1) and (5) of the National Labor Relations Act (the "Act").

On September 5, 1985, the Regional Director issued a Complaint and Notice of Hearing on the Charge. Following the filing of the Company's Answer, which denied the essential allegations of the Complaint, the Board's General Counsel moved for Summary Judgment on the Complaint.

On October 7, 1985, the Associate Executive Secretary of the Board issued an Order transferring proceedings to the Board and Notice to Show Cause why the motion of the General Counsel should not be granted. On October 21, 1985, the Company responded to the Order and Notice to Show Cause.

On December 31, 1985, the Board entered an Order granting the General Counsel's Motion for Summary Judgment (App., pp. 11a-19a).

On January 30, 1986, the Company petitioned the Sixth Circuit for a review of the Order of the National Labor Relations Board. The court's jurisdiction was invoked pursuant to 29 U.S.C. §160(f). On March 11, 1986, the Board filed a Cross-Application for Enforcement of its Order.

On April 28, 1987, the Sixth Circuit entered its decision granting the Board's petition for enforcement (the "Decision") (App., pp. 1a-10a).

ARGUMENT

I. This Court Should Resolve a Conflict Among the U. S. Courts of Appeals Regarding the Standard of Judicial Review Applicable to Election Certification Cases Before the National Labor Relations Board.

In the Decision below, the Sixth Circuit stated that the issue before the court was whether the Board had "acted within the wide degree of discretion entrusted to it by Congress in resolving questions arising during the course of representation proceedings." Nos. 86-5115/5262, slip op. at 3 (App., p. 3a). Quoting a decision of the U. S. District Court of Appeals for the District of Columbia, the court added that "[t]he only question presented on judicial review is whether the Board has reasonably exercised its discretion in the matter." *Id.* (App., p. 3a) (quoting *Amalgamated Clothing Workers of America* v. *NLRB,* 424 F. 2d 818, 827 (D.C. Cir. 1970)). Accordingly, the court below appears to have applied an "abuse of discretion" standard of review.

The court below, however, also stated that the "Board's findings of facts are conclusive if supported by substantial evidence on the record considered as a whole." Nos. 86-5115/5262, slip op. at 3 (App., p. 3a). This is, of course, the "substantial evidence" standard outlined by Section 10(e) and (f) of the Act, 29 U.S.C. §160(e) and (f) (App., pp. 37a-39a).

The Sixth Circuit appears to have applied both standards in its Decision below.

The Sixth Circuit has, in the past, wavered in selecting an appropriate standard for judicial review in

cases involving election misconduct. *See, e.g., NLRB* v. *Holland American Wafer Co.,* 683 F. 2d 135 (6th Cir. 1982) (abuse of discretion standard used to evaluate the Board's test for measuring the substantiality of misrepresentations); *NLRB* v. *Pinkerton's Inc.,* 621 F. 2d 1322 (6th Cir. 1980) (specific findings evaluated under a substantial evidence standard, but issue framed by the court was whether the Board abused its discretion); *Harlan # 4 Coal Co.* v. *NLRB,* 490 F. 2d 117 (6th Cir.), *cert. denied,* 416 U. S. 986 (1974) (substantial evidence standard applied).

In *NLRB* v. *State Plating & Finishing Co.,* 738 F. 2d 733 (6th Cir. 1984) (App., pp. 216a-235a), the Sixth Circuit held that the abuse of discretion standard was not appropriate and that the substantial evidence standard should be used where the Board is applying its rules to particular facts.

More significantly, there is a trifurcated conflict among the decisions of the U. S. Courts of Appeals as to which standard or combination of standards should be applied.

1. The U. S. Courts of Appeals for the Third, Fifth and Seventh Circuits have held that the appropriate standard of review is whether the Board's decision is supported by substantial evidence in the record as a whole.

In *Mosey Manufacturing Co., Inc.* v. *NLRB,* 701 F. 2d 610 (7th Cir. 1983) (App., pp. 155a-192a), the Seventh Circuit held that the appropriate standard for review where the challenged Board findings are factual in nature is whether those findings are supported by

substantial evidence on the record as a whole. The court stated:

> It is true but irrelevant that direct judicial review of the Board's decision to certify a collective bargaining representative on the basis of an election is extremely limited.
>
> . . .
>
> It is also true, but again irrelevant, that the Board enjoys an unusually broad discretion in deciding what rules to apply to election campaigns. . . . The courts that have applied an abuse of discretion standard to election disputes have done so precisely because the Board's authority to regulate elections is plenary, but in so doing have overlooked the difference between discretion in formulating rules and discretion in applying them to facts.

701 F. 2d at 614-15 (App., pp. 164a-165a); *accord NLRB* v. *Browning-Ferris Industries of Louisville, Inc.*, 803 F. 2d 345 (7th Cir. 1986).

Similarly, in *Jamesway Corp.* v. *NLRB*, 676 F. 2d 63 (3d Cir. 1982) (App., pp. 91a-123a), the Third Circuit rejected the Board's argument that the abuse of discretion standard should be applied when the court is called upon to review a decision of the Board regarding the conduct of an election. The Third Circuit noted that confusion as to the appropriate standard to be applied had resulted from the language used in *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324 (1946). In *Tower*, this Court noted the wide discretion enjoyed by the Board in establishing the procedures and safeguards necessary to insure the fair and free choice of bargain-

ing representatives by employees. *Id.* at 330. The *Jamesway* court noted, however, that there was no indication the court intended to displace the substantial evidence standard of review under 29 U.S.C. §160(e). 676 F. 2d at 67 (App., p. 100a); *accord NLRB* v. *L & J Equipment Co., Inc.*, 745 F. 2d 224 (3d Cir. 1984), *reh'g denied*, 750 F. 2d 25, *on remand*, 278 N.L.R.B. No. 74 (1986).

The U. S. Court of Appeals for the Fifth Circuit has also held that the appropriate standard for judicial review of a decision of the Board is whether the Board's finding is supported by substantial evidence in the record considered as a whole. *NLRB* v. *South Mississippi Electric Power Association*, 616 F. 2d 837 (5th Cir. 1980) (App., pp. 209a-215a); *see also NLRB* v. *Golden Age Beverage Co.*, 415 F. 2d 26 (5th Cir. 1969).

2. The U. S. Courts of Appeals for the First, Fourth and Tenth Circuits and for the District of Columbia Circuit, however, apply an "abuse of discretion" standard of review.

In *Melrose-Wakefield Hospital Association, Inc.* v. *NLRB*, 615 F. 2d 563 (1st Cir. 1980) (App., pp. 137a-154a), the First Circuit held that the Board has wide discretion in setting standards for the conduct of representation elections and "its rulings on the effect of a particular campaign practice will be set aside only if they are an abuse of discretion." 615 F. 2d at 567, (App., pp. 143a-144a) (citations omitted).

Similarly, the Fourth Circuit has held that "[o]nly if it is found that the Board abused its discretion in the

promulgation or application of such standards will the courts overrule the Board's determination regarding the validity of a representation election." *Schneider Mills, Inc.* v. *NLRB,* 390 F. 2d 375 (4th Cir. 1968) (App., pp. 236a-266a).

The Tenth Circuit has also applied the "abuse of discretion" standard in an election dispute case. *Kustom Electronics, Inc.* v. *NLRB,* 590 F. 2d 817 (10th Cir. 1978) (App., pp. 123a-136a).

The U. S. Court of Appeals for the District of Columbia has indicated it will show even more deference to the Board's decisions. In *Amalgamated Clothing and Textile Workers Union* v. *NLRB,* 736 F. 2d 1559 (D.C. Cir. 1984) (App., pp. 40a-67a), that court stated:

> Given that the decision whether to overturn an election requires a delicate balancing of two alternatives the Board is far more qualified to make the judgments involved than are the courts. . . . The Board is better able than are we to make such judgments about practical impact on a particular workplace; indeed, such judgments are closely akin to the kinds of questions of fact whose resolution the NLRA commits to the agency. . . . In short, the Board's expertise makes it better able than are the courts to gauge the extent to which holding a rerun election, which at first blush appears to merely maintain the status quo, actually operates to deprive employees of rights guaranteed by the NLRA.

736 F. 2d at 1563-64 (App., pp. 49a-51a).

The court added that it would not independently assess the totality of the circumstances involved. 736 F. 2d at 1570 (App., p. 63a).

3. Finally, the U. S. Courts of Appeals for the Second, Eighth and Ninth Circuits tend to apply a mixed standard when reviewing decisions concerning election disputes. *See, e.g., Bausch & Lomb, Inc.* v. *NLRB,* 451 F. 2d 873 (2d Cir. 1971); *NLRB* v. *Target Stores, Inc.,* 547 F. 2d 421 (8th Cir. 1977); *NLRB* v. *Big Three Industries, Inc.,* 602 F. 2d 898 (9th Cir. 1979).

In light of the conflicts among the Circuits outlined above, this Court should determine the appropriate standard of review to be applied in cases involving judicial review of election dispute cases before the Board.

II. This Court Should Resolve a Conflict Among the U. S. Courts of Appeals Regarding the Standard of Proof Necessary to Justify Overturning Board Certifications of Election Results.

In its Decision below, the Sixth Circuit held that, for the election to be overturned on the basis of racial slurs, threats and other acts of intimidation by the Union or its agents, the employer must produce specific evidence on two points. The court stated that the employer was required "to prove that the coercive acts actually occurred, and, second . . . that these acts interfered with the employee's choice and affected the outcome of the election." Nos. 86-5115/5262, slip op. at 8-9 (App., p. 9a).

The court's decision regarding the standard of proof to be met by the Company is an erroneous decision on an important question of law and is in conflict with decisions of the U. S. Courts of Appeals for the Second and Third Circuits.

In *I.T.T. Corp.* v. *NLRB,* 712 F. 2d 40, 44 (2d Cir. 1983), *reh'g denied,* 718 F. 2d 201, *cert. denied,* 466 U. S. 978 (1984) (App., p. 87a), the Second Circuit set aside the Board's certification of an election and enunciated the standard for determining whether conduct had impaired employees' freedom of choice in an election. The court stated: "[W]e cannot say that the election was held in an atmosphere 'free not only from interference, restraint, or coercion violative of the Act, *but also from other elements which prevent or impede* a *reasoned choice.*'" 712 F. 2d at 45 (App., p. 89a) (quoting *I.T.T. Lighting Fixtures* v. *NLRB,* 658 F. 2d 934, 936 (2d Cir. 1981) and *Sewell Manufacturing Co.,* 138 N.L.R.B. 66, 70 (1962)) (emphasis added).

In a case addressing the impact of racial slurs on an election, the Third Circuit also held that the Board's function is to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, "free not only from interference, restraint or coercion violative of the act, but also from other elements which prevent or impede a reasoned choice." *NLRB* v. *Silverman's Men's Wear, Inc.,* 656 F. 2d 53, 58 (3d Cir. 1981) (App., p. 203a) (quoting *Sewell Manufacturing Co.,* 138 N.L.R.B. 66, 70 (1962)).

In the Decision below, the Sixth Circuit erroneously ignored the fact that an election may be invalid, not only where acts interfere with the employee's choice so as to affect the outcome of the election, but also where, as here, other elements prevent or impede a reasoned choice.

III. This Court Should Rectify the Failure of the U. S. Court of Appeals for the Sixth Circuit to Apply the Standard for Judicial Review Established by This Court in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951).

In *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951) (App., pp. 267a-293a), this Court held that, when reviewing a decision of the National Labor Relations Board, a court of appeals is required to consider not only the evidence which justified the Board's decision but also the evidence of record which "fairly detracts" from the weight of the supporting evidence. 340 U. S. at 488 (App., p. 282a).

In the Decision below, however, the Sixth Circuit simply reiterated the evidence and inferences relied on by the Board's Hearing Officer. The Decision states that "[the company] produced no new evidence and, instead, merely repeats the evidence presented to the Hearing Officer." Nos. 86-5115/5262, slip. op. at 5 (App., p. 6a).

The Company, in its brief to the court below, detailed serious discrepancies in the Union witnesses' testimony and inaccuracies in the Hearing Officer's evidentiary inferences. The Company also pointed out uncontradicted testimony in support of its position

which the Hearing Officer completely ignored. All of such evidence and testimony fairly detracted from the evidence cited in support of the Hearing Officer's decision.

The Decision below failed to address the fact that substantial evidence was presented to, but ignored by, the Hearing Officer. Such evidence included an employee's advance knowledge that pro-Union employees planned to plant marijuana in the truck of a black employee who opposed the Union and the fact that Ku Klux Klan references and racial slurs were made on Company truck radios after the filing of the Petition. The Hearing Officer incorrectly dismissed the threats and slurs as "common" (App., p. 33a), but the evidence, by any standard, "fairly detracted" from the weight of the supporting evidence.

The Decision below indicates that the Sixth Circuit misapprehended the standard of review to be applied in such cases pursuant to the decision in *Universal Camera Corp.* As a result, the decision below conflicts with the applicable decision of this Court in *Universal Camera Corp.* v. *NLRB.*

IV. This Court Should Decide an Important Federal Question Affecting Union Agency Determinations Under *NLRB* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973).

The Hearing Officer, in her report, found that Company employees who handed out authorization cards prior to the election were not agents of the Union (App., p. 28a). The Company produced evidence that the employees who solicited signatures on authorization

cards represented to other employees that those who did not sign authorization cards would be charged higher initiation fees than those who did sign prior to the election. Promises to waive initiation fees are, of course, traditional grounds for setting aside an election where the promises are made by Union agents. *NLRB* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973).

The Hearing Officer found that none of the employees who solicited authorization cards were agents of the Union and that none of the alleged statements regarding waiver of initiation fees could constitute cause for overturning the election (App., p. 28a).

In the decision below, the Sixth Circuit declined to address the agency question.

This Court should address the agency question, not only because it presents an important question under federal labor law, but particularly because the National Labor Relations Board has recently imposed a new standard to be applied in determining agency in factual situations such as those presented by the case below.

Section 2(13) of the Act, 29 U.S.C. §152(13), provides that:

> In determining whether any person is acting as an "agent", of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

In *Davlan Engineering, Inc.*, 283 N.L.R.B. No. 124 (April 30, 1987) (App., pp. 68a-78a), the Board held

that employees who solicit authorization cards should be deemed special agents of the Union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies made by the employees in the course of soliciting.

Moreover, the Board held in *Davlan* that the Union is to be deemed responsible for representations concerning its fee waiver policies made by such special agent solicitors, whether or not they have been specifically authorized or instructed to speak on the subject. The Union may avoid such responsibility by clearly publicizing a lawful fee waiver policy in a manner reasonably calculated to reach unit employees *before* they sign cards (App., p. 74a) (emphasis added).

In *Davlan,* the Board expressly overruled cases inconsistent with its decision. As a result, the law that was relied on by the Hearing Officer in deciding the agency question is no longer valid.

In light of this departure from the previously recognized standard for application of Section 2(13) of the Act in card solicitation cases, this Court should address the inconsistency of decisions and formulate a standard to be applied by the courts of appeals in resolving agency questions in card solicitation cases where *Savair* violations are alleged.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Order of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
SEE, SIXTH CIRCUIT RULE 24

Nos. 86-5115/5262

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TONY SCOTT TRUCKING, INC., - - - - *Petitioner Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD, - *Respondent Cross-Petitioner.*

ON PETITION TO REVIEW AND CROSS APPLICATION TO ENFORCE AN ORDER FROM THE NATIONAL LABOR RELATIONS BOARD

Decided and Filed April 28, 1987

Before: JONES and RYAN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

PER CURIAM. This is before the court on Tony Scott Trucking, Inc.'s ("Company") petition to review and the National Labor Relations Board's ("Board") cross-application to enforce an order issued by the Board against the Company on December 31, 1985. The Board found that the Company violated §§ 8(a)(1) and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (5) (1982), by refusing to bargain with the General Drivers, Warehousemen and Helpers Local Union No. 89 ("Union"), affiliated with the International Brotherhood

of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which had been certified as the exclusive representative of an appropriate unit of the Company's employees following the representation proceedings described below. We grant the Board's petition for enforcement.

On July 11, 1984, the Union filed a petition with the Board seeking a representation election for a unit of the Company's employees. The Board conducted a secret ballot election for employees on September 6, 1984. Thirty-three valid ballots were cast, 19 in favor of and 15 against representation by the Union. The Company filed timely objections to the election, alleging that the Union had impermissibly interfered with the election by offering to waive initiation fees for those employees who signed authorization cards before the election, and by subjecting employees to threats of physical harm, racial slurs, false accusations of criminal wrongdoing, and other acts of intimidation. A hearing was held to resolve the issues raised by the objections. On November 14, 1984, the hearing officer issued a report recommending that the objections be overruled and the Union be certified. The Company filed timely exceptions to this report. On May 10, 1985, the Board adopted the hearing officer's findings and recommendations and certified the Union as the collective bargaining representative of the employees in the unit.

Thereafter, the Company refused to bargain with the Union. The Union then filed an unfair labor practice charge, and the Board issued a complaint alleging that the Company's refusal to bargain with the Union violated the NLRA . In its answer, the Company claimed that its refusal to bargain was not unlawful because the Union was improperly certified. The General Counsel moved for summary judgment and the Board issued an order to show cause why the motion should not be granted. The Company filed a response repeating its allegations that the Union's

conduct had affected the outcome of the election. On December 31, 1985, the Board issued its decision and order, finding that all issues raised by the Company in the unfair labor practice proceeding were or could have been litigated in the prior representation proceeding, and that the Company had not offered any newly discovered and previously unavailable evidence or alleged any special circumstances that would warrant a re-examination of the decision in the representation proceeding. Accordingly, the Board granted the motion for summary judgment and held that the Company had violated the Act by refusing to bargain with the Union. The Board's order required that the Company cease and desist from refusing to bargain with the Union and from in any way interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by the Act.

The issue before us is whether the Board, in overruling the Company's objections and certifying the Union, acted within the "wide degree of discretion" entrusted to it by Congress in resolving questions arising during the course of representation proceedings. *See NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946). "The only question presented on judicial review is whether the Board has reasonably exercised its discretion in the matter." *Amalgamated Clothing Workers of America* v. *NLRB*, 424 F. 2d 818, 827 (D.C. Cir. 1970). The Board's findings of fact are conclusive "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e). The Board's reasonable inferences may not be displaced on review even though the court might justifiably have reached a different conclusion had the matter been before it *de novo*. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

I.

In its first objection, Company alleges that the Union interfered with employees' rights to refrain from union

activities or membership by offering a waiver of initiation fees for employees who signed authorization cards before the election. In order to succeed in its claim, the Company must establish two elements: (1) that such an offer was made, and (2) that it was made by the Union or its agents. *See NLRB* v. *Savair Mfg. Co.*, 414 U. S. 270 (1973). In *Savair*, the Supreme Court held that a union's promise to waive initiation fees for only those employees who signed a recognition slip prior to an election unlawfully interferes with an employee's free choice in the election.

The Company bases its claim of a *Savair* violation on the testimony of two individuals. The first is Roger Curry, who testified that about two months before the election, he was approached by another employee, Jimmy Burton, who was involved in union activities, and asked to sign a union authorization card. Curry refused to sign and told Burton he "wasn't going to sign no damn card." On the afternoon of July 18, 1984, following an employee meeting called by management, Curry drove his truck past the Tri-State Bedding Company in Bowling Green, Kentucky. He observed about twenty Company employees meeting in the Tri-State parking lot. One of the employees, Lewis Burton (Jimmy's brother) called Curry over. Curry stopped and talked with Lewis and Jimmy Burton and Tom Cox, another employee. According to Curry, with Cox and Jimmy Burton standing "right beside him," Lewis Burton told Curry "that if [he] didn't sign the card, it would cost [him] $150, if [he] did [sign the card then], it would cost $10." Curry again refused to sign. Curry also testified that Jimmy Burton later approached him and said that he would "come out cheaper" if he signed a card before the election.

The second individual is Jimmy Hudson, a Company mechanic. Hudson claims that he also heard a similar representation regarding a waiver of initiation fees.

Hudson, who was working on a truck at the Bowling Green Facility, overheard an unidentified employee speaking to other employees in the truck shop, saying "those that didn't sign the card now, it would cost [them] a $100 later on." Hudson, however, could not see or identify the speaker or the other individuals who were present. He also stated that no one ever asked him to sign an authorization card.

Charles Priddy, an assistant president of the Union, also testified at the hearing. He stated that he conducted only two official meetings for employees of the Company during the organizing campaign. Priddy told the employees, in response to a question, that the dues and fees for the Union were fixed and they would be the same for all employees whether or not they had signed a union card. Priddy also stated that he never authorized any employee to act as a spokesman or representative of the Union.

Lewis Burton testified and denied having made any of the statements ascribed to him by Curry. Jimmy Burton and Tom Cox both testified and denied hearing Lewis Burton say anything about initiation fees. Jimmy Burton also denied making any of the comments Curry claims he made.

After hearing this testimony, the hearing officer stated that:

> I found Curry's testimony concerning the cost of joining the Union to be less than credible. His testimony was contradictory and somewhat confused. In particular, I do not credit Curry's testimony that Lewis Burton told him that if he didn't sign a card it would cost $150 and if he did it would cost $10.

App. 51. The hearing officer then concluded that no *Savair* violation had occurred. The Board adopted this conclusion.

The Company now argues that the hearing officer's finding on this issue is erroneous. The Company relies

entirely on Curry's and Hudson's testimony. It produces no new evidence and instead merely repeats the evidence presented to the hearing officer. The hearing officer was faced with conflicting testimony as to whether an offer of a waiver of initiation fees had been made. He weighed the testimony of the witnesses and chose to assign more credibility to the version presented by the Union and its supporters. The Board adopted this finding.

Deference to the Board's factual findings is particularly appropriate where the "record is fraught with conflicting testimony and essential credibility determinations have been made." *NLRB* v. *Nueva Engineering, Inc.*, 761 F. 2d 961, 965 (4th Cir. 1985). The Board's determination that there was no *Savair* violation is supported by substantial evidence. Since we have concluded that the Board's finding that no offer to waive initiation fees was made is supported by substantial evidence, we need not address the second element of the alleged *Savair* violation.

II.

The Company's second allegation is that the Union or its agents made racial slurs and threats against Curry for refusing to sign a union authorization card, planted a bag of marijuana in his truck in retaliation, and engaged in other acts of intimidation, thus precluding a fair election. Curry, a black man, testified that shortly after he refused Jimmy Burton's request that he sign an authorization card he began hearing "slurs" over the CB radio in his truck. He claims that the word "nigger" was used. He testified that at the time these slurs were used his name was not mentioned and no slurs were directed at him in person. He also testified that he overheard a conversation on the CB radio between two pro-union employees, Eddie Bryant and Tom Cox. According to Curry, Cox said, "we need to get rid of the nigger. He ain't going to help us no way."

Cox allegedly then said that he "had called the Ku Klux Klan in Louisville and one of them told him they would come down and do away with a fellow for $100 and he was going to call them back that night and tell them to go ahead." Bryant reportedly then told Cox to go ahead. Curry said that he subsequently heard "slurs that didn't amount to nothing" over the CB. He also testified that the words "nigger sucks Scotty" were written with a finger in the dust on the ticket box where he picked up the papers for his loads.

Curry also testified that a bag containing marijuana was planted in his truck while it was parked at an asphalt plant where he was picking up a load. According to Curry, Cox and Burton were in the shop where the truck was located on the morning of the day the substance was found. Curry testified, however, that he did not see anyone place anything in his truck. The substance was never tested to see if it was actually marijuana and the incident was never reported to the police. Both Burton and Cox denied placing marijuana in Curry's truck. Finally, Curry testified that Cox told him that if he wasn't going to vote "yes," he should not vote at all.

Jimmy Lewis, a supervisor, testified that Curry told him about the CB threat regarding the KKK. Lewis also testified that the word "nigger" was frequently used on the CB. Jimmy Hudson, another black employee, testified that he never heard any racial slurs directed at him.

Bryant and Cox both denied participating in the conversation reported by Curry. Eight other employees who had been working in the area at the time of the alleged threats testified, and all stated that they had not heard any threats concerning the KKK. Cox and Bryant also denied making any racial slurs toward Curry. None of the other eight employees who testified reported hearing any slurs directed at Curry. The Company failed to produce any

witnesses to corroborate Curry's testimony that a threat had been made against him over the CB radio.

After considering this testimony, the hearing officer concluded that: "even if I were to credit Curry's testimony concerning the threat, and the identity of its perpetrators, which I do not, I would find that it did not interfere with the election." The officer dismissed the other racial allegations as "too trivial and speculative to warrant serious consideration" and concluded that none of the "slurs were ever linked directly to any employee's support for or opposition to the [Union]." The officer also dismissed the marijuana planting allegation as "ridiculous" and concluded that Cox's alleged comment to Curry not to vote did not "constitute objectionable conduct." The officer finally concluded that "the conduct at issue here did not create a general atmosphere that would warrant setting aside the election." The Board adopted this conclusion.

The Company now claims that the finding that the Union did not, through its agents, create a hostile and coercive atmosphere sufficient to warrant setting aside the election is arbitrary, unreasonable, and contrary to applicable law. This court has noted that "a party who seeks to overturn the results of a representation election has the burden to show that the election was not fairly conducted." *NLRB* v. *Bostik Div.*, 517 F. 2d 971, 975 (6th Cir. 1975). This burden "is not met by proof of mere misrepresentations or physical threats. Rather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *NLRB* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 30 (5th Cir. 1969).

An election will be overturned if the "coercive actions have created 'an atmosphere of fear and reprisal such as to render free expression of choice impossible.'" *Beaird-*

Poulan Div. v. *NLRB*, 649 F. 2d 589, 594 (8th Cir. 1981) (quoting *NLRB* v. *Griffith Oldsmobile Inc.*, 455 F. 2d 867, 870 (8th Cir. 1972)); *see also Hickman Harbor Serv.* v. *NLRB*, 739 F. 2d 214, 220 (6th Cir. 1984). Such an atmosphere is created by "confusion violence and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal." *Al Long, Inc.*, 173 NLRB 447, 448 (1968). If the objecting party fails to demonstrate the existence of such a general atmosphere, then setting aside the election is unwarranted.

The Company had to produce specific evidence on two points in order to have the election overturned. First, it had to prove that the coercive acts actually occurred and, second, it had to prove that these acts interfered with the employees' choice and affected the outcome of the election. The Company, however, failed to produce specific evidence on either of these points. First, it is highly debatable that the events to which Curry testified actually transpired. The hearing officer, who heard testimony on both sides of the issue, chose not to credit Curry's testimony. In light of the fact that no one corroborated Curry's testimony or heard what Curry claims was said, the officer's conclusion seems reasonable. We do not, however, necessarily believe that racial allegations should ever be treated as "trivial." They require careful consideration, which the record shows occurred here. Second, the Company completely failed to produce specific evidence that any employee was affected by the alleged threats or that the outcome of the election was affected. Curry himself, the supposed target of these alleged threats, testified that on election day he "just walked in and voted." No other employee testified that his or her vote was affected by these alleged threats.

Finally, Cox's suggestion to Curry that he not vote unless he voted for the Union is not enough to cause the election to be overturned. The simple fact that one em-

ployee urged another to vote for union representation does not merit the setting aside of a representation election. The Board's conclusion that the election should not be set aside is supported by substantial evidence.

Therefore, the petition for enforcement is GRANTED.

UNITED STATES OF AMERICA

Before The

NATIONAL LABOR RELATIONS BOARD

Case 9—CA—22288

TONY SCOTT TRUCKING, INC.

AND

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

Upon a charge filed by the Union 14 August 1985, the General Counsel of the National Labor Relations Board issued a complaint 5 September 1985 against the Company, the Respondent, alleging that is has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 10 May 1985, following a Board election in Case 9-RC-14524, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed. Reg. 45922 (1981); *Frontier Hotel,* 265 NLRB 343 (1982).) The complaint further alleges that since 17 May 1985 the Company has refused to bargain with the Union. The Company's amended answer admitted in part and denied in part the allegations in the complaint.

On 4 October 1985 the General Counsel filed a Motion for Summary Judgment. On 7 October 1985 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

RULING ON MOTION FOR SUMMARY JUDGMENT

In its amended answer to the complaint, the Company admits the refusal to bargain with the Union. The Company, however, contends that the election was invalid and the Union's certification improper.

The record, including the record in Case 9-RC-14524, reveals that an election was held 6 September 1984 pursuant to a Stipulated Election Agreement. The tally of ballots shows 19 for and 14 against the Union, with 2 challenged ballots. The challenged ballots were insufficient in number to affect the results of the election. The Company filed timely objections to the election, alleging that the Union improperly offered to waive initiation fees for employees who signed authorization cards before the election and destroyed election conditions by making threats, racial slurs, and false accusations. After a hearing, a hearing officer recommended overruling the Company's objections. The Company filed timely exceptions to the hearing officer's report. On 10 May 1985 the Board in an unpublished decision adopted the hearing officer's recommendations and issued a certification of representative. In the response to the Notice to Show Cause, the Company, in effect, asks the Board to reconsider its decision.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special

circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co.* v. *NLRB,* 313 U. S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.[1]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. Jurisdiction

The Company, a Kentucky corporation, is engaged in hauling road construction materials at its facility in Bowling Green, Kentucky, where it annually derives gross revenues in excess of $50,000 for services performed in constructing Federal interstate highways within the State of Kentucky, and purchases and receives products, goods, and materials valued in excess of $20,000 directly from points outside the State of Kentucky. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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[1]In view of our disposition of this case, the General Counsel's motion to strike the Respondent's amended answer is denied.

II. Alleged Unfair Labor Practices

A. *The Certification*

Following the election held 6 September 1984 the Union was certified 10 May 1985 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time truck drivers and mechanics employed by the Employer at its Barren River Road, Bowling Green, Kentucky facility, but excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 17 May 1985 the Union has requested the Company to bargain, and since 17 May 1985 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By refusing on and after 17 May 1985 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and

desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962); *Lamar Hotel,* 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U. S. 817 (1964); *Burnett Construction Co.,* 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Tony Scott Trucking, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and part-time truck drivers and mechanics employed by the Employer at its Barren River Road, Bowling Green, Kentucky facility, but excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Bowling Green, Kentucky, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 31 December 1985

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[2]If this notice is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Donald L. Dotson, Chairman

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with General Drivers, Warehousemen and Helpers Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and part-time truck drivers and mechanics employed at our Barren River Road, Bowling Green, Kentucky facility, but excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

TONY SCOTT TRUCKING, INC.

_____
(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3663.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Case 9-RC-14524

TONY SCOTT TRUCKING, INC. - - - *Employer*

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA - - - - - *Petitioner*

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered objections to an election held 6 September 1984 and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 19 for and 14 against the Petitioner, with 2 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings[1]

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[1]The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings. Consequently, we find it unnecessary to pass on the hearing officer's alternative discussion based on her agency findings.

and recommendations, and finds that a certification of representative should be issued.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for General Drivers, Warehousemen & Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time truck drivers and mechanics employed by the Employer at its Barren River Road, Bowling Green, Kentucky facility, but excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., 10 May 1985.

Donald L. Dotson, Chairman

Robert P. Hunter, Member

Patricia Diaz Dennis, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

REGION 9

Case No. 9-RC-14524

In the Matter of

TONY SCOTT TRUCKING, INC. - - - *Employer*

and

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA - - - - - - - - - *Petitioner*

HEARING OFFICER'S REPORT ON OBJECTIONS TO ELECTION AND RECOMMENDATIONS TO THE BOARD

Pursuant to the provisions of a *Stipulation For Certification Upon Consent Election,* herein called the Stipulation, approved by the Regional Director on August 9, 1984, an election by secret ballot was conducted on September 6, 1984 among certain employees[1] of the Employer to determine whether such employees desired to be represented by the Petitioner for the purposes of collective bargaining.

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[1]The appropriate bargaining unit set forth in the Stipulation is as follows: "All full-time and part-time truck drivers and mechanics employed by the Employer at its Barren River Road, Bowling Green, Kentucky facility, but excluding all office clerical employees, all other employees and all professional employees, guards and supervisors as defined in the Act.

Upon the conclusion of the election, a tally of ballots was furnished to the parties in accordance with the Rules and Regulations of the National Labor Relations Board, herein called the Rules and the Board, respectively, which disclosed the following results:

Approximate number of eligible voters	35
Void ballots	0
Votes cast for the Petitioner	19
Votes cast against the participating labor organization	14
Valid votes counted	33
Challenged ballots	2
Valid votes counted plus challenged ballots	35

On September 13, 1984 the Employer filed timely objections to conduct of the election, herein called the Objections, which were duly served upon the Petitioner in conformity with the Rules.

Pursuant to the provisions of Section 102.69 of the Rules, an investigation of the issues raised by the Objections was conducted under the direction and supervision of the Regional Director who concluded that a hearing be held to resolve the issues raised by the Employer in its Objections Nos. 1 and 2.

Pursuant to the Notice of Hearing issued by the Regional Director, a hearing was held before the undersigned at Bowling Green, Kentucky on October 30, 1984. All parties were present, represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues and to make oral arguments. The decisions and recommendations herein are based upon my consideration of the record as a whole and upon my observation of the demeanor of the witnesses.

OBJECTION NO. 1

In its Objection No. 1, the Employer alleges that the Petitioner offered a waiver of initiation fees for those employees who signed authorization cards before the election. Employees Roger Curry and Jimmy Hudson testified for the Employer concerning this Objection. Curry stated that on July 18, 1984, following a meeting which Respondent's President James Scott, had held at the Employer's facility, he saw approximately 20 employees gathered in the Tri-State Bedding Company parking lot. Curry stopped to speak to the group, which included employees Lewis Burton, Jimmy Burton and Tom Cox. Curry testified that Lewis Burton told him that if he did not sign that card it would cost him $150 and if he did it would cost him $10. Curry responded that he was not signing the card. Curry stated that Jimmy Burton told him on another occasion that he would come out cheaper if he signed a card. He also stated that he had told Burton that he did not have to sign because he had a withdrawal card from the Petitioner. Curry further testified that he was a former member of the Petitioner who had obtained a withdrawal card from the Petitioner. He stated that he knew he would not have to pay any charges to join the Petitioner because he was on a withdrawal card.

Jimmy Hudson, a mechanic, testified that one day while he was working on a truck at the Employer's shop, some drivers came in and said apparently to each other that those who did not sign a card now, would have to pay $100 later on. Hudson could not see or identify the speaker or the other individuals who were present. He stated that no one ever asked him to sign an authorization card.

Charles Priddy, an assistant to the president of the Petitioner, credibly testified that the Petitioner conducted only two official meetings for employees of Tony Scott

Trucking during the organizing campaign. Those meetings were held at the Bowling Green Ramada Inn on July 7 and on September 4. At the meetings, Priddy sat alone at the front of the room facing all of the 20 to 25 employees who attended. Priddy told the employees, in response to questions, that the dues and fees for the Petitioner were fixed by the secretary-treasurer and he could not tell them with any certainty what those dues and fees would be. However, according to his credited testimony, he stated that they would be the same for all employees whether or not they had signed a union card and that after a contract had been signed there would be a higher rate for new employees.

Priddy never authorized any employee to act as a spokesman for the Petitioner or as the Petitioner's representative, either at those meetings or at any other time. (Assistant to the President Lonnie Fields had mailed the authorization cards to an employee and set up the original meeting before Priddy was involved in the organizing drive.) Approximately 20 cards had been signed and returned to the Petitioner prior to the July 7 meeting. Priddy talked to Tom Cox and Jimmy Burton on the telephone concerning the election date, dates of the two meetings and the date of the hearing. The Petitioner never distributed any literature, appointed an in-plant organizing committee or arranged for any distribution of cards after the initial meeting on July 7.

DISCUSSION:

I found Curry's testimony concerning the cost of joining the Union to be less than credible. His testimony was contradictory and somewhat confused. At one point, in response to a question by the hearing officer, he stated that no one had told him that it would be cheaper to sign a card now as opposed to later and that no one but Lewis Burton made comments to him about how much it would cost.

Later, Curry testified that Jimmy Burton told him, sometime after July 18, that he would come out cheaper if he signed a card. Furthermore, Curry testified that he had a withdrawal card from the Petitioner and that he was aware, at all times during the campaign, that no initiation fee would be required of him in any event because he had obtained the withdrawal card. In particular, I do not credit Curry's testimony that Lewis Burton told him that if he didn't sign a card it would cost $150 and if he did it would cost $10.

Even if the testimony were credited, there is no evidence that Lewis Burton had any apparent authority to act on behalf of the Petitioner, nor were his comments ratified by anyone with such authority.

The Employer contends that Jimmy Burton, Lewis Burton and Tom Cox cloaked themselves with apparent authority to act for the Petitioner by conducting meetings and calling themselves spokespersons, by handing out authorization cards and talking by telephone to the Petitioner's representative, Mr. Priddy, to obtain information concerning the campaign and the election and in the case of Tom Cox and Jimmy Burton, by assisting the Petitioner's representatives at the August 8 representation hearing which resulted in an Agreement for an election.

Employee's active support of the Union and the fact that they communicated the times of union meetings to other employees at the plant is not sufficient to show that those employees were cloaked with authority to act on behalf of the Union. *American Enka Company, a Division of Akzona Incorporated,* 231 NLRB 1335, (1977) *Tuf-Flex Glas, a Part of Libby Owens-Ford Company* v. *N.L.R.B.* 715 F. 2d 291, (7th Cir., 1983 enfg. 265 NLRB No. 101).

Lewis Burton attended the two meetings held by Priddy, as well as the "meeting" at Jimmy Burton's house at which cards were initially signed and the "meeting" at the Tri-

State Bedding parking lot. He signed a card himself and handed out only one card. He engaged in no other union activities. Even the most active supporters of the Union did not engage in activity that was sufficient to cause them to be viewed as agents of the Petitioner. Eddie Bryant telephoned the Petitioner's Louisville office to request authorization cards. He distributed several cards to other employees and gave about 20 cards to Tom Cox. He attended the "meeting" at Jimmy Burton's house. Tom Cox informed other employees about the "meeting" at Jimmy Burton's house, telling them he was trying to organize a union as one way for employees to better themselves. He handed out 15 to 20 authorization cards himself. During the pre-election period, he called Priddy in Louisville four or five times to get information, including the times on when Priddy would conduct meetings with employees. He notified employees about the dates and times of those meetings and attended them but did not sit with Priddy during the meetings. Additionally, Cox attended the August 8 representation hearing at Priddy's request and was consulted by Priddy and his attorney concerning the appropriate time for the election. Jimmy Burton notified some drivers of the "meeting" at his house at which Bryant and Cox handed out authorization cards. He himself, asked one other driver, Roger Curry, to sign an authorization card. Burton telephoned Priddy two or three times concerning employee meetings and the election and spread the word about those meetings to other employees. He attended the August 8 representation hearing at which he advised Priddy and his attorney concerning the time for the election. On July 18 at an employee meeting conducted by the Employer's President, James D. Scott, Burton said that some of the *employees* had asked him to speak for them. He also acted as the Union's observer at the election. While he attended the meetings conducted by Priddy,

he did not sit with Priddy at those meetings nor was he identified as an agent of the Union at those meetings.

Under all the circumstances herein I find that none of the active employees were cloaked with apparent authority to act on behalf of the Union either regarding initiation fees or any other matters. The instant case is readily distinguishable from *Bio-Medical Applications of Puerto Rico, Inc.*, 269 NLRB No. 41 in which the Board found that members of an inplant organizing committee were cloaked with apparent authority to act on behalf of the petitioner because they had campaigned for the petitioner at plants other than the one at which they worked, they had used the official union letterhead on their communications and they had spoken on behalf of the petitioner at meetings held by the petitioner in that case.

It is clear that an election must be set aside when a union promises a waiver of initiation fees to those employees who signed authorization cards prior to an election. *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973). However, statements by employees regarding a waiver of initiation fees, in contravention of the *Savair* rule, have been found not to be grounds for overturning an election when the offer was not authorized by the Petitioner. *Firestone Steel Products Co.*, 235 NLRB 548 (1978). Accordingly, none of the alleged statements regarding the cost of joining the Union could constitute cause for overturning the election in this case. They were not made by agents of the Petitioners and the Petitioner clearly stated its valid policy regarding initiation fees.

OBJECTION NO. 2:

In its Objection No. 2, the Employer alleges that the Petitioner threatened employees with physical harm, made racial slurs, made false accusations of criminal wrongdoing,

instructed employees not to vote unless they intended to vote for the Petitioner and engaged in other acts of intimidation.

A. *Threat of Physical Harm and Racial Slurs:*

Roger Curry, a black driver, testified that shortly after he refused Jimmy Burton's request that he sign an authorization card for the Petitioner he began hearing "slurs" over the CB radio in his truck. The only "slur" to which Curry testified was use of the word "nigger." Curry stated that he was the only black employee working on the I-65 jobsite at Elizabethtown, Kentucky, where the CB comments were made, at the time and that his name was not used. No "slurs" were directed to him in person. Curry also testified that shortly after he refused to sign the card he overheard a conversation on the CB radio between two persons whom he identified from the "Handles" or nicknames and their voices as Eddie Bryant and Tom Cox. According to Curry, Cox said, "We need to get rid of the nigger. He ain't going to help us no way," and then said that "he had called the Klu Klux in Louisville and one of them told him they would come down and do away with a fellow for $100 and he was going to call them back that night and tell them to go ahead." Bryant told Cox to go ahead. Curry said that subsequently he heard "slurs that didn't amount to nothing" over the CB, that Tom "kept the words going on the radio for about 2 weeks, regularly," and that "it ain't never quit." All of the comments were supposed to have been made on Channel 19 of the CB, which the truck drivers on the jobsite keep open for communications. Furthermore, Curry testified that the words "nigger sucks Scotty" were written with a finger in the dust on the ticket box where he picked up the papers for his loads.

Dispatcher Jimmy Lewis, a supervisor, testified that Curry told him about the CB threat regarding the Klu Klux Klan before July 4, 1984. (The Petition was filed on July 11, 1984.) Lewis testified that the word nigger was frequently used on the CB when he drove a truck prior to becoming a dispatcher. Jimmy Hudson, a black mechanic who worked in the Employer's Bowling Green shop, testified that he never heard any racial slurs directed at him.

There was no evidence that the Klu Klux Klan threat or the "slurs" were ever reported to the police or any authority other than Lewis. Nor was there any evidence that any threat was communicated to any employee other than Curry.

Both Bryant and Cox credibly denied participating in the conversation regarding the Klu Klux Klan which was attributed to them. Bryant stated that prior to the union activity, he and Currry had had an argument in which they threatened to whip each other and called each other "some things" but no blows were ever struck. Eight other employees who had been working in the Elizabethtown area at the time of the alleged threats testified at the hearing. All stated that they had not heard any threats concerning the Klu Klux Klan. Furthermore, Cox and Bryant denied making any racial slurs toward Curry. None of the eight other employees who testified had heard such slurs directed at Curry.

B. *Accusation of Criminal Wrongdoing:*

Curry testified that on Saturday, July 14, Ronnie _____, the operator of the blacktop plant where he was picking up blacktop material, found a bag of marijuana in Curry's truck. Curry stated that Tom Cox and Jimmy Burton had been at the shop that morning while the brakes on Curry's truck were being repaired by a mechanic identified only as

"Fats." He did not see anyone place anything in his truck. Curry reported the finding of the alleged marijuana to Dispatcher Jimmy Lewis but made no report to the police. Lewis went out to the asphalt plant and picked the bag up from the field where it had been thrown by the operator. Although Lewis testified that he believed it to be marijuana, he did not have it tested nor did he report the incident to the police. Both Burton and Cox denied placing marijuana in Curry's truck or having any knowledge of how it came to be there. Neither the blacktop plant operator nor the mechanic were called as witnesses.

C. *Instruction Not to Vote:*

Curry testified that Tom Cox told him that if he wasn't going to vote yes, not to vote at all. He dated this statement in response to one question as occuring one day before the election and in response to another question as a week or 2 weeks before the election. He said he heard Cox stopping "them all" and telling them how to vote "every day," and "all day until after the election." Curry testified that he voted in the election.

There is no evidence that the Union had knowledge of or affirmed, the alleged threat, "slurs," "planting" of marijuana, or statements to vote yes or not at all.

In making credibility resolutions, I note particularly that, although approximately 12 employees drove trucks on the Employer's I-65 jobsite at Elizabethtown, Kentucky during the period preceding the election, the Employer was unable to produce any witnesses to corroborate Curry's statement that a threat had been made over the CB radio, on the channel customarily used by all of the Employer's drivers. I further note that the one employee witness who was presented by the Employer testified that he never heard any "slurs." I also note that although the Employer contends that the threat was a serious matter, it was never

reported to the police either by Curry or by supervisor Lewis, to whom it was reported. Nor was there any evidence that the Employer attempted to discipline or restrain the employees who had allegedly made the threats.

The Board has long held that an election will be set aside if conduct occurs which is sufficient to create a general atmosphere of fear of reprisal so that the employees are precluded from exercising a free choice. *Allied Plywood Corp.*, 122 NLRB 959; *Bauer Welding and Metal Fabricators, Inc.*, 268 NLRB No. 216. The acts of third parties, including employees who are not acting under the actual or apparent authority of the Union are given less weight in determining whether or not conduct actually or potentially effects the freedom of choice of employees. *Orleans Mfg. Co.*, 120 NLRB 630 (1958), *Fabricut, Inc.*, 233 NLRB 1196 (1977). The Board has also held that only conduct occurring during the "critical period" between the date of the filing of the petition and the date of the election may be considered as a basis for setting aside an election. *The Ideal Electric and Manufacturing Company*, 134 NLRB 1275; *House of Mosaics, Inc., Subsidiary of Thomas Industries, Inc.*, 215 NLRB 704; *Goodyear Tire and Rubber Co.*, 138 NLRB 453.

In the opinion of the undersigned the conduct at issue here did not create a general atmosphere and reprisal which would warrant setting aside the election. The alleged threat concerning the Klu Klux Klan, even if credited, was isolated, remote in time from the election and outside the "critical period". The threat was not made in person, did not refer to Curry by name and was not linked to the Petitioner, or to the signing of authorization cards. It was not communicated to other employees, and Curry testified that on July 18, approximately 2 weeks after the alleged threat, he told a group of union supporters that he wasn't going to sign a card. At no time did Curry or

anyone else testify that any threats or "slurs" were made which specifically were linked to the Petitioner's organizing drive.

"For conduct to warrant the setting aside of an election, not only must that conduct be coercive but it must be so related to the election as to have a probable effect on the employee's actions at the polls. . . . the Board does not overturn an election where irregularities are not of such nature as would have tended to make a free election improbable." *American Enka Company*, 231 NLRB at 1343.

I find that the evidence in this case is insufficient to show that the laboratory conditions were destroyed by the single alleged threat to Curry, which was never communicated to any other employee and which, according to Curry's own testimony, did not discourage him from openly voicing his opposition to the Union or from voting. Even if I were to credit Curry's testimony concerning the threat, and the identity of its perpetrators, which I do not, I would find that it did not interfere with the election.

The remaining allegations of objectionable conduct are too trivial and speculative to warrant serious consideration. The Employer's supervisor, Lewis, testified that he had often heard the word "nigger" on the CB radio of his truck when he was a driver, and several drivers testified that "rough" language was regularly used over the CB. While the use of such language is not commendable, it is common and there was no testimony that any "slurs" were ever linked directly to any employee's support for or opposition to the Petitioner.

That the Petitioner could be found responsible for a substance, which was never conclusively identified as marijuana, being planted in Curry's truck is ridiculous. The Employer apparently contends that since Tom Cox and Jimmy Burton were at its premises on the day on which the alleged marijuana was found, they placed it in the truck.

I find it significant that the Employer failed to call either the mechanic who worked on the truck in the morning before the alleged marijuana was found or the operator who found it. I also note that the incident was apparently not serious enough to report to the police. Finally, I find that Tom Cox and Jimmy Burton credibly denied that they had anything to do with the placement of the substance in Curry's truck.

Tom Cox's alleged statement to Curry that he should not vote at all unless he intended to vote for the Petitioner was not accompanied by any threat of physical violence and it was not heeded by Curry, who testified that he voted in the election. A mere statement by one employee to another urging him to vote for the Union does not constitute objectionable conduct. See *Beaird-Poulan Division, Emmerson Electric Co.* v. *N.L.R.B.*, 649 F. 2nd 589, 594 (C.A. 8, 1981).

In summation, I find that the pre-election conduct which was established by the Employer could not have realistically created an atmosphere requiring the election to be set aside. *A T R Wire and Cable, above.*

RECOMMENDATIONS:

Based on my findings of fact and conclusions as set forth above, the undersigned recommends that the Board overrule the Employer's objections nos. 1 and 2 and further recommends that the Board issue the appropriate certification.

Within 10 days of the issuance of this report, any party may file with the Board an original and 7 copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon each of the other parties.

Dated at Cincinnati, Ohio this 14th day of November 1984.

(s) Patricia R. Fry
Patricia R. Fry, Hearing Officer
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

Attachment

SECTION 7, NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

SECTIONS 10(e) AND (f), NATIONAL LABOR RELATIONS ACT, 29 U.S.C. § 160(e) and (f)

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be

taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

Nos. 82-2359, 83-1369.

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent,*
M. LOWENSTEIN CORPORATION, - - - *Intervenor.*

M. LOWENSTEIN CORPORATION, - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent,*
AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC, - - - - *Intervenor.*

Argued January 13, 1984.
Decided June 22, 1984.

Company petitioned for review of National Labor Relation Board's unfair labor practice finding, and union petitioned for review of Board's remedy for unfair labor practices, while Board cross-applied for enforcement of its order. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that : (1) preelection conduct did not so attenuate free choice as to compel rerun election, but (2) court properly denied "make whole" remedies.

Order enforced.

Bork, Circuit Judge, filed concurring opinion.

1. Labor Relations Key 215

It is for National Labor Relations Board in first instance to make delicate policy judgments involved in determining

when "laboratory conditions" required for representation election have sufficiently deteriorated to require a rerun election.

2. Labor Relations Key 676

In cases involving allegations of prounion coercion, a court will overturn National Labor Relation Boards decision to certify victorious union following representation election only where activities of union supporters created an atmosphere of fear and coercion which made a free and fair election impossible.

3. Labor Relations Key 508

In controlling and overseeing representation elections, National Labor Relations Board enjoys great discretion.

4. Labor Relations Key 215

In carrying out National Labor Relations Act's goal of ensuring employee free choice, National Labor Relations Board, in cases involving allegations of prounion coercion in representation election, must consider carefully not only circumstances surrounding original election, but also likelihood that rerun election would more effectively advance employee free choice.

5. Labor Relations Key 671

Scope of review of National Labor Relation Board's decisions in cases involving certification is extremely limited; if Board has followed appropriate and fair procedures, and if Board has reached rational conclusion concerning whether atmosphere surrounding representation election so attenuated free choice that a rerun election was necessary, Court of Appeals will not presume itself to be better able than Board to assess impact of alleged instances of misconduct in an election.

6. Labor Relations Key 676

National Labor Relations Board did not abuse its discretion in determining that conduct occurring prior to representation election, including one overheard conversation that could have been interpreted to contain a threat, one threat made in jest by a union supporter, one anonymous phone call threatening damage to an employee's car followed by a minor act of vandalism committed on that car, one other anonymous threat of indeterminate date and content, and four minor acts of vandalism did not so attenuate employees' free choice so as to necessitate rerun election.

7. Labor Relations Key 617

National Labor Relation Board's discretion in area of remedies for unfair labor practices is great.

8. Labor Relations Key 616

National Labor Relations Board will only issue a retroactive bargaining order when employer has unilaterally changed the terms and conditions of employment after it has committed unfair labor practices.

9. Labor Relations Key 614

National Labor Relation Board acts reasonably in denying attorney fees and litigation expenses unless employer has acted in bad faith in asserting nondebateable defenses in order to drag out the proceedings.

10. Labor Relations Key 616

Employer's defenses to its refusal to bargain, namely, that prerepresentation election conduct of prounion employees attenuated free choice in that election, were inadequate, but were at least debateable, and therefore National Labor Relations Board properly rejected union's request for "make whole" remedies.

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Leon Schulzinger, New York City, with whom Arthur M. Goldberg and David M. Heiser, New York City, were on the brief, for Amalgamated Clothing and Textile Workers Union, petitioner in No. 82-2359 and intervenor in No. 83-1369.

John S. Burgin, Greenville, S.C., with whom Stuart M. Vaughan, Jr., Greenville, S.C., was on the brief, for M. Lowenstein Corp., petitioner in No. 83-1369 and intervenor in No. 82-2359.

Christine Weiner, Atty., N.L.R.B., Washington, D.C., with whom Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., was on the brief, for respondent.

Before WRIGHT, MIKVA and BORK, Circuit Judges.

Opinion for the court filed by Circuit Judge J. SKELLY WRIGHT.

Concurring opinion filed by Circuit Judge BORK.

J. SKELLY WRIGHT, Circuit Judge:

On July 1, 1981 a representation election was held at the Morgantown, North Carolina plant of M. Lowenstein Corp. (the company). The Amalgamated Clothing and Textile Workers Union (the union) won the election by the narrow margin of 101-94. In addition to the counted ballots, five ballots were challenged. Today, more than two and a half years later, collective bargaining between the company and the employees' elected representative at the plant has yet to begin. In the intervening period the company has contested the National Labor Relations Board's decision to certify the union and has refused to obey the Board's bargaining order so that it may obtain judicial review of the certification decision. *See Boire* v. *Greyhound Corp.*, 376 U. S. 473, 477-478, 84 S. Ct. 894, 896-897, 11 L. Ed. 2d 849 (1964) (certification decisions are not

reviewable as such, but can be examined in the course of proceedings brought against employer for refusal to bargain); *American Federation of Labor* v. *NLRB*, 308 U. S. 401, 60 S. Ct. 300, 84 L. Ed. 347 (1940) (same); *Hartz Mountain Corp.* v. *Dotson*, 727 F. 2d 1308, 1310-1312 (D.C. Cir. 1984) (discussing cases). The Board in turn has found the Company's refusal to bargain to be an unfair labor practice in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), 158 (a)(5) (1982). In No. 83-1369 the company petitions for review of the Board's unfair labor practice finding. In No. 82-2359 the union petitions for review of the Board's remedy for the unfair labor practices. The Board has cross-applied for enforcement of its order. For the reasons that follow we affirm the Board's order in all respects.

The procedural history of this case is apparently not unusual. The company filed timely objections to the election results. Among the objections urged by the company —and the only objections before the court today—were allegations that union agents and supporters had threatened and otherwise coerced eligible voters, thereby destroying the "laboratory conditions" required for an NLRB election. On September 1-2, 1981 a hearing was held on the company's charges. On November 5, 1981 the Hearing Officer issued his report recommending that the Board reject the company's charges and certify the union as the exclusive representative of the employees in the bargaining unit. The Board accepted[1] the Hearing Officer's recommenda-

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[1]The Board adopted the Hearing Officer's findings and recommendations in full, with the following proviso: "In finding that the allegedly objectionable conduct did not interfere with the employees' free choice in the election, we disavow the Hearing Officer's reliance on the subjective effect on the employees' state of mind." *M. Lowenstein Corp. and ACTWU*, Decision and Certi-

(Footnote Continued on Next Page)

tions on March 17, 1982. After the company refused to bargain or to supply information to the union, the union filed an unfair labor practice charge. Both the NLRB General Counsel and the union filed motions for summary judgment before the Board, with the union's motion including a request for special "make whole" remedies (*i.e.*, an "interim" grievance procedure, litigation expenses, attorney fees, and a bargaining order retroactive to the date of the election).

On September 24, 1982 the Board granted the General Counsel's summary judgment motion and denied the union's request for special remedies. 264 NLRB No. 14 (1982). It is this decision—challenged by the company as to liability and by the union as to remedy—that is before the court in this proceeding.

I. The Liability Determination

A. *Applicable Legal Standards*

[1] The Board has stated that a representation election should be held in "laboratory * * * conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). But, although the "laboratory conditions"

(Footnote Continued From Preceding Page)

fication of Representative, NLRB Case 11-RC-4999, March 17, 1982, at 1 n. 2, *reprinted in* Appendix to the Briefs (App.) 36. Presumably, the Board is referring here to the Hearing Officer's discussion of the fact that no evidence was introduced to show that any employee actually changed his vote as a result of the alleged fear or coercion. Because we rely only on those portions of the Hearing Officer's findings that were approved by the Board, this proviso is irrelevant for present purposes. Therefore, there is no need to distinguish between the Hearing Officer and the Board in what follows, and our references to the Hearing Officer should be understood as references to the Board as well.

standard represents a noble ideal, it must be applied flexibly, for in its extreme form it is a standard that "no seasoned observer considers realistic." Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV.L.REV. 38, 45 (1964). We have noted "that union elections are often not conducted under ideal conditions" and that "there will be minor (and sometimes major, but realistically harmless) infractions by both sides, and that the Board must be given some latitude in its effort to balance the right of the employees to an untrammeled choice, and the right of the parties to wage a free and vigorous campaign." *NLRB* v. *Mar Salle, Inc.*, 425 F. 2d 566, 571 (D.C. Cir. 1970) (internal quotation marks omitted); *accord NLRB* v. *ARA Services, Inc.*, 717 F. 2d 57, 66 (3rd Cir. 1983) (*en banc*) ("Given the nature of inter-employee relations, the Board cannot realistically be expected to create a totally frictionless election environment."); *NLRB* v. *Heath Tec Division/San Francisco*, 566 F. 2d 1367 (9th Cir., 1978); *Bush Hog, Inc.* v. *NLRB*, 420 F. 2d 1266, 1267 (5th Cir. 1969). It is for the Board in the first instance to make the delicate policy judgments involved in determining when laboratory conditions have sufficiently deteriorated to require a rerun election.

[2, 3] The company's particular allegation in this case is that laboratory conditions were destroyed by activities of union agents and supporters that created a climate of fear and coercion. In cases involving allegations of pro-union coercion, a court will overturn the Board's decision to certify the victorious union only where the activities of union supporters created "an atmosphere of fear and coercion which made a free and fair election impossible." *Daylight Grocery Co.* v. *NLRB*, 678 F. 2d 905, 909 (11th Cir. 1982); *accord Tuf-Flex Glass* v. *NLRB*, 715 F. 2d 291, 296 (7th Cir. 1983); *NLRB* v. *Advanced Systems, Inc.*, 681

F. 2d 570, 575 (9th Cir. 1982); *Beaird-Poulan Division, Emerson Electric Co.* v. *NLRB*, 649 F. 2d 589, 594 (8th Cir. 1981) (*citing NLRB* v. *Griffith Oldsmobile, Inc.*, 455 F. 2d 867, 870 (8th Cir. 1972)). In controlling and overseeing representation elections, the Board enjoys great discretion. *See Amalgamated Clothing Workers of America* v. *NLRB*, 424 F. 2d 818, 826-828 (D.C. Cir. 1970).

There are a number of reasons, however, why the Board has particularly broad discretion in making the kind of decision under review here: the decision whether employees' free choice was so attenuated that a rerun election is necessary. The Board's conclusion concerning the level of coercion present in the "atmosphere" of a plant at the time of an election is the kind of delicate, fact-based determination that can be made only after careful weighing of all of the evidence. Because the Board is much closer to the facts than we as an appellate court can possibly be, our review of the Board's conclusions is limited. *See* 29 U.S.C. § 160(e) (1982) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951); *Conair Corp.* v. *NLRB*, 721 F. 2d 1355, 1367-1368 (D.C. Cir. 1983). In this case, for instance, a Hearing Officer held a two-day hearing in which representatives of the company, union officials, and factory employees testified. The Hearing Officer was uniquely well-placed to draw conclusions about credibility when testimony was in conflict, and he was also far better situated than are we to draw conclusions about a matter as ephemeral as the emotional climate of the plant at the time of the election. *See, e.g., Tuf-Flex Glass, supra,* 715 F. 2d at 295 (Hearing Officer's credibility determinations "may not be overturned absent the most extraordinary circumstances such as utter disregard for sworn testimony or the accept-

ance of testimony which is on its fact incredible"); *Beaird-Poulan Division, supra,* 649 F. 2d at 592 n. 2; *Certain-Teed Products Corp.* v. *NLRB,* 562 F. 2d 500, 505 (7th Cir. 1977). The Hearing Officer's conclusions were fully endorsed by the Board, and we are extremely reluctant to second-guess these conclusions based on our reading—two years later—of a cold record. *See Worley Mills, Inc.* v. *NLRB,* 685 F. 2d 362, 364 (10th Cir. 1982).

[4] Equally important in counseling deference to Board decisions in cases of this kind is the fact that the Board's particular expertise qualifies it—rather than the courts—to decide whether to call for a rerun election. *Cf. Conair Corp., supra,* 721 F. 2d at 1373. The representation election process under the NLRA is not an abstract exercise in achieving ideal conditions; it is rather an intensely practical process designed to maximize employee free choice under the very real constraints and conditions that exist in the nation's workplaces. One of these constraints is the fact that delay itself almost inevitably works to the benefit of the employer and may frustrate the majority's right to choose to be represented by a union; forcing a rerun election may play into the hands of employers who capitalize on the delay to frustrate their employees' rights to organize. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV.L.REV. 1769, 1793-1795 (1983); Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence,* 1981 U.ILL.L.REV. 75, 88-97[2]; *see also St. Francis Federation of Nurses &*

[2]The article by Professors Roomkin and Block is particularly instructive. They begin by noting the "conventional wisdom" that "the passage of time makes it more difficult for the union to retain the loyalties of workers because delay gives employers added opportunity to dissuade employees and increases the likelihood of turn-

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Health Professionals v. *NLRB*, 729 F. 2d 844, 857 (D.C. Cir. 1984). The inevitable defects in the original election will thus have to be weighed against the possible threats to employee free choice that a rerun election will entail; although neither the original election nor the rerun election may achieve an ideal of absolute free choice, one possibility or the other may still ensure the greatest possible free choice in a particular plant at a particular time. In carrying out the NLRA's goal of ensuring employee free choice, the Board must therefore consider carefully not only the circumstances surrounding the original election, but also the likelihood that a rerun election would more effectively advance employee free choice.

Given that the decision whether to overturn an election requires a delicate balancing of two alternatives, the Board is far more qualified to make the judgments involved than are the courts. First, the Board will have to assess the actual impact of a rerun election—with its attendant delays—on the employees' ability to make a free choice. The Board is better able than are we to make such judgments

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over in the workforce." *Id.* at 76. They recognize that, until the time of their study, "little published material provide[d] convincing evidence that lawyers and other consultants advise their clients in representation proceedings to stall intentionally." *Id.* But "the effectiveness of this tactic remains a widely accepted part of industrial relations folklore." *Id.* at 76-77. They assert that lobbying efforts on Capitol Hill by both business and labor "resulted in part from [the recognition by the business and labor communities] that time had strategic importance in election cases." *Id.* at 77. The purpose of their study was thus to provide empirical support or refutation of this widely held belief. There is no doubt that the result of their careful study of newly-available administrative records of the NLRB (*see id.* at 77) strongly supports the proposition that delays in the election representation process work in favor of the employer and against the union.

about practical impact on a particular workplace; indeed, such judgments are closely akin to the kinds of questions of fact whose resolution the NLRA commits to the agency. *See* 29 U.S.C. § 160(e). Second, the Board will have to make the comparative judgment whether, given the likely practical impact of a rerun election in a particular plant at a particular time, such a rerun election would be a more genuine expression of employee free choice than was the original election. Even if we felt comfortable in making the fact-based prediction about the actual impact of a rerun election, we would still be reluctant to substitute our judgment for the Board's as to whether the original election or a rerun election will more likely be an expression of employee free choice.[3] Our review under the NLRA commits such comparative judgments to the Board. *Universal Camera Corp., supra*, 340 U. S. at 488, 71 S. Ct. at 465 (reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*"). In short, the Board's expertise makes it better able than are the courts to gauge the extent to which holding a rerun election, which at first blush appears

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[3]The concurring opinion suggests that delay may often work in favor of the union. We are unaware of any data supporting this conclusion. Nonetheless, if (contrary to the conclusions of Professor Weiler and Professors Roomkin and Block) delay in fact operated in a significant number of cases to frustrate employees' anti-union desires, it would provide all the more reason to defer to Board decisions not to order rerun elections. To the extent that delay works against employee free choice—regardless whether it benefits the union or the employer—the Board has the expertise to gauge this effect and act accordingly in deciding whether to hold a rerun election.

to merely maintain the status quo, actually operates to deprive employees of rights guaranteed by the NLRA.[4]

[5] For these reasons, the scope of our review of the Board's decisions in cases involving certification is extremely limited. *See Amalgamated Clothing Workers, supra*, 424 F. 2d at 827. If the Board has followed appropriate and fair procedures, and if the Board has reached a rational conclusion concerning whether the atmosphere surrounding the election so attenuated free choice that a rerun election was necessary, we will not presume ourselves—occupying a vantage point remote in time and place from the election at issue—to be better able than the Board to assess the impact of alleged instances of misconduct on an election.

B. *Applying the Legal Standards*

[6] The company objects that a number of incidents that occurred prior to the election, taken singly or collectively, created an atmosphere of fear and coercion. It is useful briefly to go over the incidents.

1. *Threats made by union supporters.* The company claims that on two occasions pro-union employees threatened anti-union employees.

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[4]We wish to make clear that our discussion of delay ought not be taken as a rebuke to the employer in this case; we have no reason to believe that the employer here did anything other than vigorously press its position before the agency and in this court. Rather, our discussion is aimed at understanding the regulatory landscape in which the Board makes decisions of the type under review today. Our conclusion is simply that, because the Board's decision whether to order a rerun election is a comparative judgment concerning the likely effects of delay versus the likelihood of a "cleaner" rerun election, particular deference must be given to the Board's decision.

(a) *The Ball incident.* In the first incident Joyce Wilson, an election observer for the company, overheard Mike Ball, a pro-union employee, talking "about the cars being torn up by the union people against the people that were anti-union" and stating that "people could be hurt." App. 128. The Hearing Officer found that the comment was a part of a conversation among pro-union employees, and was neither directed at nor intended to be taken as threatening anti-union workers. Moreover, he found that there was no evidence that the incident was widely known among the workers in the plant; Wilson testified only that she told her supervisor about it.

The Hearing Officer concluded that this comment did not "taint[] the atmosphere." App. 15. We fully agree that a comment of this type could easily have had little effect on the hard-fought election campaign. The evidence presented to the Hearing Officer showed that the company had frequently posted photographs and descriptions of strike violence on the canteen bulletin board. *See* App. 253-257. The conversation in question, which took place in the canteen where the company's bulletin board was located, could easily have been a discussion of the problem that the company itself clearly wanted to bring to the employees' attention. As such, it would be irrelevant to the inquiry as to whether the union and its supporters had created an atmosphere of fear and coercion in the plant.

The company suggests that this incident should be taken considerably more seriously because, according to it, Ball himself was a member of the In-Plant Organizing Committee (IPOC), a group of pro-union employees who supported the organizing campaign. The company argues that misconduct by union agents is generally counted more heavily in determining whether an election was valid than misconduct committed by mere supporters of the union. *See, e.g., ARA Services, Inc. supra*, 717 F. 2d at 66; *Beaird-*

Poulan Division, supra, 649 F. 2d 594; *Orleans Mfg. Co.,* 120 NLRB 630, 633-634 (1958). According to the company, members of the IPOC were union agents, and Ball's threat should therefore be given a great deal of weight in evaluating the election.

The Hearing Officer found that members of the IPOC were not agents of the union. App. 7. He found that members of the IPOC drafted, endorsed, and distributed leaflets, solicited employees to join the union, wore pro-union insignia, and even made visits to the homes of fellow employees to urge them to support the union. But none of the IPOC members held official positions with the union, received formal training or instruction from the union, or were paid by the union for their work on the campaign. Moreover, there is no evidence that the union had knowledge of or in any way affirmed Ball's remark. *See Tuf-Flex Glass, supra,* 715 F. 2d at 196. The Hearing Officer therefore found that the IPOC members (and Ball in particular) were not union agents.

We hold that the Hearing Officer appropriately found that the union was not responsible for the actions of workers over whom the union has no effective control. One of the reasons that misconduct by union agents is considered more serious than the same misconduct by mere supporters is that the union can exercise considerable control over its own personnel and can—by providing formal training and field experience to those with whom it its permanently associated or over whom it exercises control—see to it that they are familiar with at least some of the niceties of labor doctrine. To hold that the IPOC members were union agents would be in effect to penalize the union for conduct that it has little or no power to prevent. Moreover, it is well settled that employees are less likely to be coerced by the conduct of fellow employees than by the threats of outsiders who wield the full powers of the union.

See, e.g., ARA Services, Inc., supra, 717 F. 2d at 66. Employees have the ability, "from experience in the workplace, to give appropriate weight to possibly impulsive statements of fellow employees in the heat of a campaign." *Id.* Thus, even if Ball's statements were understood to be threatening, his fellow employees would presumably realize that the statements were mere reflections of the "temper and passion" of the moment. *Id.* For these reasons, we agree with the Board's conclusion that Ball was not a union agent.

To bolster its argument the company relies heavily on *PPG Industries, Inc.* v. *NLRB,* 671 F. 2d 817 (4th Cir. 1982); *see* brief for petitioner in No. 83-1369 at 15, 16, 18. Over the strong objections voiced by the Board's Hearing Officer in that case, *see* 671 F. 2d at 820-821 n. 5, the *PPG* court held that the IPOC members in the factual circumstances of that case were union agents. The court found conclusive "the telling force of the shoe-on-the-other-foot argument." *Id.* at 821 n. 6. The court argued that, had the IPOC members performed the same activities for the company instead of the union, they would clearly have been *company* agents; the court felt that this compelled a conclusion that the actual IPOC members should be held to be *union* agents. The company in the instant case argues that we should adopt the *PPG* court's reasoning which would inevitably lead, according to the company, to a holding that Ball was a union agent.

We believe that, because the company and the union are situated somewhat differently with respect to their relationship to the employees in a given plant, facially similar conduct by company and union may lead to quite different results when deciding whether an employee is a company or union agent. For instance, in *PPG* the union organizer asked IPOC members to be the union's "eyes and ears" in the plant. 671 F. 2d at 819. If a manager of the company

had made a similar request to an employee, it may have tended to support a finding that the employee had become a company agent, because the company is by definition present at the plant at all times and in the ordinary course does not need "eyes and ears" in the plant; the request could thus only be interpreted to mean that the company was commissioning the employee for particularly special service. The union, on the other hand, is restricted in its access to the plant and therefore may have to rely on employees to inform it, for example, of unfair labor practices committed by ther employer. This example does not of course demonstrate that the "shoe on the other foot" argument is always invalid in this context. But we believe that its validity should not be assumed absent a more discerning inquiry into the significance of the various aspects of the relationship between the union and the IPOC.

In short, although there may have been evidence pointing in both directions on the agency issue, we are satisfied that in this case the Board drew a reasonable conclusion.[5]

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[5]It is worth noting that the agency determination may also involve important consequences for labor policy, and deference to the Board's decision is therefore all the more important. If, for instance, a court holds that IPOC members are union agents when the union has no other full-time organizer at the plant site, the effect will likely be that unions will be forced to see to it that they *do* have full-time organizers at each plant during representation campaigns: A union that did not put a full-time organizer at a given site would lay itself open to the possibility that the plant's IPOC members—who are likely not to be familiar with the technicalities of labor law and over whom the union may have no effective control—will violate election rules and thus give the employer grounds for requiring rerun elections. Because requiring unions in this way to have full-time organizers present during each election campaign raises serious questions of labor policy, it is an issue that is for the Board, not the courts, to settle.

See Worley Mills, Inc., supra, 685 F. 2d at 366 (determination of essentially factual agency issue is for Board, not courts). It represents a reasonable evalution of the control the union was able to exert over the IPOC, as well as a plausible policy judgment concerning the extent to which the union ought to be held responsible for IPOC members' conduct.

There is one more reason why the company's argument concerning the Ball incident must be rejected. As the Eighth Circuit has recently noted, excessive attention to the agency issue can divert attention from the central issue at stake: "whether threats, by whomever made, created a coercive environment." *NLRB* v. *Monark Boat Co.*, 713 F. 2d 355, 360 (8th Cir. 1983). The relationship between a union and its supporters can be too complex to permit conclusory labels of "agent" or "nonagent" to be useful analytic tools. In such cases the crucial issue is the effect of a given incident on the atmosphere within the plant; regardless of the label to be attached to Ball, we are satisfied that, with respect to this underlying question, the Hearing Officer reached an appropriate result.

(b) *The Conley incident.* An anti-union employee, Harold Conley, was allegedly threatened on or near election day. Sharply conflicting evidence was presented concerning most aspects of the alleged threat, but the Hearing Officer found that a pro-union employee told Conley that, if Conley did not vote for the union, he would kill Conley and "[drink] up all of his liquor." App. 15. The Hearing Officer also found, however, that this statement was made in jest. He based his finding on the reference to the liquor and testimony that Conley's nickname ("Half Pint") was well known around the plant as a humorous reference to his drinking proclivities. In addition, the Hearing Officer relied on (disputed) testimony that Conley and the three

other employees present all laughed when the statement was made.

We have no trouble accepting the Hearing Officer's findings. The testimony was in conflict, and the Hearing Officer, who had the opportunity to observe the witnesses and question them himself, chose to credit one version of the incident. *See Keokuk Gas Service Co.* v. *NLRB*, 580 F. 2d 328, 334 (8th Cir. 1978); *Abbott Laboratories, Ross Laboratories Division* v. *NLRB*, 540 F. 2d 662, 666-667 (4th Cir. 1976); *cf. Worley Mills, Inc., supra*, 685 F. 2d at 368 (joking threat will not upset election result); *Federal-Mogul Corp.* v. *NLRB*, 566 F. 2d 1245, 1253 (5th Cir. 1978) (same); *NLRB* v. *Bostik Division, USM Corp.*, 517 F. 2d 971, 973-974 (6th Cir. 1975) (same).

2. *Anonymous threats and incidents of vandalism.*

(a) *Pre-petition threats.* Evidence showed that a number of anti-union employees received anonymous threatening phone calls. First, a former employee who was married to a current employee received three phone calls prior to the time the petition for an election was filed. The first caller told her that "people who have big fine cars and big fine homes are going to be sorry that they don't join the Union." App. 7. Details of the second phone call are not in the record, but the third caller stated that he "had 5 sticks of dynamite for [the recipient's] house and 3 stick's for [a supervisor at a neighboring plant]." App. 7. In another incident anti-union employee Robert Clark received a telephone call prior to the filing of the election petition. The caller stated that "something bad is liable to happen to your truck" unless Clark signed a union card. App. 174.

The Hearing Officer properly found that none of these incidents could be considered in overturning the election, in accord with the rule stated in *Ideal Electric & Mfg. Co.*, 134

NLRB 1275 (1961); *see NLRB* v. *Claxton Poultry Co.*, 581 F. 2d 1133, 1135 (5th Cir. 1978) (*per curiam*), that an election will not be set aside based on conduct that occurred prior to the filing of the election petition. Absent extremely unusual circumstances, *see e.g.*, *Willis Shaw Frozen Food Express, Inc.*, 209 NLRB 267 (1974) (pre-petition conduct included numerous instances of stabbings, assaults, and shootings), the Board's rule is a convenient device to limit the inquiry to the period near the election when improper acts are most likely to affect the employees' freedom of choice. We therefore find reasonable the Hearing Officer's conclusion that these calls are insufficient to support a finding that the atmosphere was so poisoned at election time that free choice was impossible.

(b) *Incidents during the election campaign.* A second category of anonymous threats includes several threats made during the election campaign. Employee Robert Clark, who had been the recipient of one of the pre-petition calls, received another, similar phone call two weeks before the election. One week later he discovered a 12-inch scratch on his truck.

Minor acts of vandalism also were committed on the cars of several other employees. One employee — while cleaning her car at home five days after the election—discovered a "big X" scratched on the hood of her car and small cuts on two tires. Another employee testified that sometime around the election he discovered a "few scratches" and a large piece of chewing gum on the front fender of his car. A third employee discovered a seven-inch and a three-inch scratch on his car approximately six weeks before the election. Finally, a fourth employee found a six-inch-long mark apparently made by a shoe on his car, and then found "little pinstripes" evidently made by a knife on the top of his door.

There may have been one other anonymous incident. Employee Keith Hoyle, a leader of the anti-union employees, claimed that Woodrow Rose, another employee, had received two telephone calls threatening him with bodily harm if he did not sign a union card. Rose himself did not testify, and the Hearing Officer gave little weight to the phone calls, evidence of which was pure hearsay and the exact content and date of which remained unknown.

The complained-of incidents fall into two categories. In the first category are the anonymous phone calls made to Clark and (to the extent it is credited) Rose. Each of these incidents on its face was at least related to the election. Yet none can be traced to specific union agents or union supporters. Two factors militate against over-valuing them in deciding the need for a rerun election. First, the union may well have had no way to prevent such incidents from occurring; a rerun election would merely risk futility, because such incidents could easily recur despite the best efforts of the union and its supporters. Second, ordering a rerun election on the basis of anonymous incidents can be devastatingly unfair to the majority of employees who have voted for the union; an unscrupulous employer could encourage anonymous pro-union incidents in order to give it grounds for use later to reverse the election result if it loses. *See Bush Hog, Inc., supra,* 420 F. 2d at 1269 ("Any other rule would invite third parties or one of the protagonists who doubted the election outcome to anonymously create incidents and then attempt to use them to set aside the election.") Recent commentators have suggested that delay itself is a tactic that is frequently used against the union (and against the exercise of genuine free choice by employees), *see* Weiler, *supra,* 96 HARV.L.REV. at 1776-1797, and fears that employers would deliberately provoke or arrange for anonymous incidents thus cannot be ignored. Although we do

not of course impute any such intentional conduct to the employer here, the possibility of this kind of abuse should make courts extremely wary when reviewing Board decisions certifying election results. For these reasons, the Board's decision not to overturn the election based on these anonymous incidents seems to us to be well within its discretion. *Cf., e.g., Daylight Grocery Co., supra,* 678 F. 2d at 909 (stating that to overturn elections on the basis of such incidents would "merely encourage anonymously created incidents").

The second category of incidents involves the minor acts of vandalism committed on employees' cars in the open parking lot. We have already noted that misconduct by known third parties is to be given less weight than misconduct by union agents. Anonymous incidents that are unambiguously related to the election are to be given still less weight. It follows that anonymous conduct that may not even be related to the union, the plant, or the election at all deserves even less weight. The same reasons that argue for caution in evaluating anonymous pro-union acts counsel even more care in evaluating anonymous acts that may have nothing to do with the election. *See Bush Hog, Inc., supra,* 420 F. 2d at 1269; *NLRB* v. *Spring Road Corp.,* 577 F. 2d 586, 588 (9th Cir. 1978). Acts of vandalism occur with alarming frequency in our society—even in factory parking lots. Given the difficulties that police departments have in controlling vandalism generally, it would hardly be fair to require the union and its supporters to keep a community free of vandalism while a representative election is going on. At any rate, the law is well settled that such minor incidents of property damage are insufficient to overturn an election. *See, e.g., NLRB* v. *Belcor, Inc.,* 652 F. 2d 856, 861 (9th Cir. 1981); *Beaird-Poulan Division, Supra,* 649 F. 2d at 592-593; *Bostik Division, USM Corp., supra,* 517 F. 2d at 974; *NLRB* v. *Monroe Auto Equipment,*

470 F. 2d 1329, 1332 (5th Cir. 1972), *cert. denied,* 412 U. S. 928, 93 S. Ct. 2752, 37 L. Ed. 2d 155 (1973). We therefore conclude that the Board appropriately exercised its judgment in deciding that none of the enumerated incidents were sufficient to require a rerun election.

3. *Totality of the circumstances.* Putting aside the pre-petition conduct, we are left with one overheard conversation that could have been interpreted to contain a threat, one threat made in jest by a union supporter, one anonymous phone call threatening damage to an employee's car followed by a minor act of vandalism committed on that car, one other anonymous threat of indeterminate date and content, and four minor acts of vandalism. The company argues, however, that even if these incidents taken singly were insufficient to demonstrate that an atmosphere of coercion had taken hold of the plant at the time of the election, the Board committed error by improperly evaluating the *cumulative* effect of the incidents. *See NLRB* v. *Van Gorp Corp.*, 615 F. 2d 759, 764-765 (8th Cir. 1980). *But see id.* at 765 ("While we emphasize the need to consider the overall conduct of an election campaign, we caution that such an approach may not be used to turn a number of insubstantial objections to an election into a serious challenge.").

The company's argument is misplaced because its misconceives the purpose of reviewing specific incidents in an election campaign. The purpose of the Board's inquiry (and of the review we have conducted above) is not to determine if any single incident taken alone requires overturning the election results; it will be a rare case indeed in which a single incident is that significant. Rather, the Board reviews the specific incidents using the rules of thumb discussed above—ignore pre-petition conduct, count misconduct by union or company agents heavily, weigh anonymous conduct lightly, etc. — as guides to assist in

making the difficult overall judgment as to whether the atmosphere in the plant at the time of the election was so poisoned that free choice was impossible. If these rules of thumb place most or all of the incidents in the least weighty categories, the Board appropriately will decide not to overturn the election results. In this case the Hearing Officer made exactly this inquiry, recommending that the union be certified, and the Board adopted his findings.

To be sure, the election at issue here was flawed when viewed against the "laboratory conditions" ideal. And the election result was quite close: if the challenges to ballots were all decided against the union, a one-vote swing out of 200 votes cast could have changed the results. *Cf. Beaird-Poulan Division, supra*, 649 F. 2d at 591 (vote was 402-383 plus 10 challenged ballots; five-vote swing out of 795 could have changed result); *Fidelity Telephone Co.* v. *NLRB*, 574 F. 2d 409, 410 (8th Cir. 1978) (vote was 30-25 plus 3 challenged ballots; one-vote swing out of 58 could have changed result); *Bostik Division, USM Corp., supra*, 517 F. 2d at 972 (vote was 60-54 plus three challenged ballots; two-vote swing out of 117 could have changed result). But requiring a rerun election runs the risk of a repetition of exactly the same incidents while reaching exactly the same result. Meanwhile, the delay engendered may itself operate against the right of employees ultimately to exercise their free choice. *See generally* Weiler, *supra*. Moreover, should the union once again win the rerun election, it will nonetheless have had the untoward consequence of delaying vindication of the employees' right to organize. The Board thus had to make delicate judgments weighing any possible infringements of free choice against the dangers of delay and the possibility of an equally flawed rerun election. Because we are disinclined to second-guess the Board when it makes the kinds of "totality of the circumstances" and balancing judgments

required in this kind of case, our review is narrow: if the Board has followed fair procedures, has evaluated the evidence on the basis of the kinds of reasonable rules discussed above, and has reached a conclusion that is reasonable given that evaluation, we may not substitute our judgment as to the ultimate result for that of the Board. In particular, we will not independently assess the "totality of the circumstances" to overturn the Board's considered decisions.

II. Remedies

Aa a remedy the Board ordered the company to cease and desist from committing unfair labor practices and to begin bargaining with the union upon request. The Board's order evidently requires the company to supply the union with the information to which it is entitled in order effectively to bargain on behalf of the employees. In ordering this remedy the Board rejected the union's request for so-called "make whole" remedies: a bargaining order retroactive to the date of the election, establishment of an "interim" grievance procedure for use by employees until a collectively-negotiated procedure could be set in place, litigation expenses, and attorney fees. The union here petitions the court to reverse the Board's order denying the requested remedies.

[7-10] We need not dwell on this aspect of the case, for the Board's discretion in the area of remedies is great, *see Fibre-board Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 215-216, 85 S. Ct. 398, 405-406, 13 L. Ed. 2d 233 (1964); *Amalgamated Clothing Workers, supra*, 424 F. 2d at 830; *Amalgamated Clothing Workers of America* v. *NLRB*, 371 F. 2d 740, 746 (D.C. Cir. 1966). In particular, the Board will only issue a retroactive bargaining order when the employer has unilaterally changed the terms and conditions of employment after it has committed unfair labor prac-

tices, *Beasley Energy Inc.*, 228 NLRB, 93, 95 n. 9 (1977); *see NLRB* v. *Eagle Material Handling, Inc.*, 558 F. 2d 160, 166-168 (3d Cir. 1977); in this case no such charges have been made. Similarly, the Board acts reasonably in denying attorney fees and litigation expenses unless the employer has acted in bad faith in asserting non-debatable defenses in order to drag out the proceedings, *see NLRB* v. *Food Store Employees Union*, 417 U. S. 1, 8-9, 94 S. Ct. 2074, 2079-2080, 40 L. Ed. 2d 612 (1974); in this case we agree with the Board that the employer's defenses to its duty to bargain—though inadequate—are at least debatable. Finally, the Board certainly had the discretion to decide that imposing the union's requested "interim" grievance procedure outside of a collective bargaining agreement was not necessary (or perhaps even desirable) to advance the purposes of the NLRA in this case. We therefore affirm the Board's denial of the union's requested "make whole" remedies.

III. Conclusion

We do not review Board certification decisions in a vacuum in which the only consideration is the existence of ideal "laboratory conditions" and in which the status quo in the plant can be effectively frozen for several years while a new election is held (and subsequent appeals are taken). Rather, our review of Board certification decisions must be responsive to the Board's recognition of the "real world" conditions in which elections are held. In fact, we confess to a feeling or dissatisfaction with the fact that today—more than two and a half years after the election of July 1, 1981 at Lowenstein's Morganton plant—bargaining has yet to commence and the employees' right to organize has yet to be fully vindicated. We therefore decline to extend the delay—and the consequent erosion of employee's rights—by requiring the Board to conduct a rerun election in the

hope that we are better able than the Board to predict that such an election will more accurately reflect an ideal of absolute free choice.

We therefore enforce the Board's order in all respects.

So ordered.

BORK, Circuit Judge, concurring.

I concur in the judgment and I agree with most of what is said in the majority opinion. I decline to join the opinion, however, because I am uncomfortable with its overall tone as well as with a number of observations scattered throughout the opinion which seem unnecessary to the result. A prime example is the majority's discussion of delay as an employer tactic. The majority states that "delay itself almost inevitably works to the benefit of the employer."[1] Maj. op. at 1563. *See also* maj. op. at 1564, 1568

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[1]This proposition, which is repeated several times in the majority opinion, is chiefly supported by repeated citations to a single law review article whose arguments are highly partisan and controversial. For example, the assumption on which the article is predicated is that "[a] major factor in [the] decline [of collective bargaining] has been the skyrocketing use of coercive and illegal tactics . . . by employers determined to prevent unionization of their employees." Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1769-70 (1983). While I trust the majority does not regard that view as axiomatic, it does seem to me that the majority should be more wary of conclusions that flow from a premise so dubious.

The second article cited by the majority, Roomkin & Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. Ill. L. Rev. 75, acknowledges that until the publication of their article "little published material provide[d] convincing evidence that lawyers and other consultants advise their clients in representation elections to stall intentionally," although "industrial relations folklore" accepts the "effectiveness of this tactic." *Id.* at 76. Also, Professors Roomkin and Block are much less sure of the "inevitable" effects of delay

(Footnote Continued on Next Page)

& 1569. It is not clear to me that the delay of a rerun election may not be a union tactic as well. A union may believe that the delay will enable it to gain strength. In any event, the employer in this case has not been accused of acting improperly for th purposes of delay and the majority does not suggest that in objecting to the election results the employer acted unlawfully or in bad faith. This discussion is inappropriate in the context of this case—which involves allegations of unlawful *pro-union* conduct. There is no need to justify the deference courts owe to the NLRB in cases such as this one by reference to the adverse effects of delay on employee free choice. Here, the Board upheld the Hearing Officer's findings that the atmosphere at the plant was not so infected by employee conduct that a rerun election should be ordered. Maj. op. at 1561-1562. This is a reasonable finding and we owe it deference. The comments about the inevitable effects of delay are superfluous and one-sided.

This one-sided view of the effects of delay means that employee free choice will be identified with union victories. That false identification will mean that the Board should consider the likelihood that a union will win again in deciding whether to order a rerun election. Maj. op. at 1563-1564 & 1564. I am pleased that the clear thrust of this reasoning is somewhat blunted, though perhaps illogically, by footnote 2.

Finally, in agreeing with the Board's conclusion that Mr. Ball was not a union agent the majority reaches out to reject the Fourth Circuit's use of the "shoe-on-the-other-

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than is the majority; according to them, their data suggests that delay "appears to increase the likelihood of the employer winning." *Id.* at 95. Finally, the Roomkin and Block study does not consider the effects of delay on rerun elections.

foot argument" in *PPG Industries, Inc.* v. *NLRB*, 671 F. 2d 817 (4th Cir. 1982). I am not at all sure that I would join in the majority's criticism of that case were it necessary for us to decide whether to apply it here. We need not make a pronouncement on every case cited to us by a party merely because it is said to be controlling. In this case, even were we to adopt the *PPG* court's reasoning, we would not inevitably hold that Ball was a union agent. As it is, the majority not only needlessly criticizes another Circuit, it also posits and decides a hypothetical case. Moreover, the majority's analysis of that hypothetical is flawed. It does not follow that every time a manager asks an employee to be the "eyes and ears" of management "the request could . . . only be interpreted to mean that the company was commissioning the employee for particularly special service." Maj. op. at 1566. This conclusion rests on the assumption, which seems to me quite artificial, that it is reasonable in every case to assume that the company is "by definition" present in the plant at all times. The case is not before us; there are no allegations here about any company agents. The majority would have done better, in my view, to have confined its discussion to the Board's findings without ranging far afield to lay down controversial but irrelevant principles and to decide hypothetical cases.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

Cases 14-CA-16116
14-RC-9383

DAVLAN ENGINEERING, INC.

AND

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ALF—CIO

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

On 13 August 1982 the Regional Director for Region 14 issued a complaint, alleging that the Respondent had violated and was voilating Section 8 (a) (5) and (1) of the National Labor Relations Act. The complaint alleges that on 13 July 1982, following a Board-conducted election in Case 14-RC-9383, the Union[1] was certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate; and that, commencing about 26 July 1982, and at all times thereafter, the Respondent has refused, and continues to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested it to do so. On 23 August 1982 the Respondent answered, admitting in part, and denying in part, the complaint's allegations.

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[1]District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO.

On 24 September 1982 the General Counsel filed a Motion for Summary Judgment. On 29 September 1982 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent filed a response to the Notice to Show Cause.

On 6 December 1982 the Board issued a Decision and Order[2] in this proceeding, granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8 (a) (5) and (1) of the Act. The Respondent petitioned for review of the Board's Decision and Order in the United States Court of Appeals for the Fourth Circuit. The petition was transferred for venue to the Eighth Circuit, where the Board filed a cross-application for enforcement of its Order. On 3 November 1983 the court granted the parties' joint motion for leave to withdraw, without prejudice, the petition for reveiw and cross-application for enforcement, in order to permit the Board's reconsideration of this case. All parties were offered the opportunity to file statements of positions in connection with the Board's reconsideration of its decision.

Ruling on Motion for Summary Judgment

In its answer to the complaint, its response to the Notice to Show Cause, and its statement of position, the Respondent repeats the argument, first raised in the representation proceeding, that four employees who solicited union authorization cards were union agents for the purpose of card solicitation so that their improper statements concerning the Union's initiation-fee-waiver policy were imputable to the Union and violated *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). Neither the General Counsel nor the Union has

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[2]265 NLRB No. 66 (1982). Not included in bound volumes.

filed a statement of position in this supplemental proceeding.

Our review of the record, including the record in Case 14-RC-9383, reveals that on 29 August 1980, pursuant to a Stipulation for Certification Upon Consent Election, an election was held among the employees in the stipulated unit. The tally of ballots shows that of approximately 53 eligible voters, 34 cast ballots for, and 16 against, the Union; there were 2 nondeterminative challenged ballots. The Respondent timely filed objections to conduct affecting the results of the election, alleging, inter alia, that four employees were union agents for purposes of soliciting other employees to sign union-authorization cards and, in that capacity, stated that the Union would waive initiation fees for employees who signed cards before the election, thereby interfering with employees' fee choice in the election under *NLRB v. Savair Mfg Co.*, 414 U.S. 270 (1973). After a hearing, the Regional Director recommended overruling the objections.

Regarding the fee-waiver statements that were the subject of the Respondent's first objection, the Regional Director concluded that the four employee-solicitors were not agents of the Union and that their statements, when evaluated under the more lenient standards applicable to third-party conduct, were not grounds for overturning the election. The four employees were not union agents when they solicited the cards, the Regional Director concluded, because they neither belonged to an in-plant organizing committee, nor were they "vested . . . with any substantial authority in connection with the distribution of authorization cards." In addition, the Regional Director relied on the absence of evidence that the Union's business agent had actual knowledge of the *Savair* statements, as well as the absence of evidence that the Union adopted or ratified the employees' statements or otherwise held out the solicitors

"in such a fashion that other employees reasonably were led to conclude that they were acting as its agents or on its behalf."

On 13 July 1982 the Board adopted the Regional Director's recommendations and certified the Union as the exclusive bargaining representative of the employees in the stipulated unit.[3] In adopting the Regional Director's recommendations, the Board affirmed its continued adherence to established precedent "which holds that the solicitation of authorization cards by employees, standing alone, does not make those employees agents of the union." 262 NLRB 850 fn. 3 (1982).

The Respondent refused to bargain with the Union. On 6 December 1982 the Board issued a Decision and Order[4] finding that the Respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the stipulated unit, and by refusing to provide the Union with information relevant and necessary to its role as exclusive bargaining representative.

We have decided to vacate our earlier Decision and Order and Certification of Respresentative.[5] Objections to representation elections based on improper initiation-fee-waiver statements made by employee card solicitors alleged

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[3] *Davlan Engineering*, 262 NLRB 850 (1982).

[4] 265 NLRB No. 66 (1982) (not included in bound volumes).

[5] A respondent in a proceeding alleging a violation of Sec. 8(a) (5) usually is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations. However, this prohibition applies to the parties to the representation proceeding and does not preclude the Board from reconsidering its own earlier action and reopening its representation proceeding.

to be union agents have all too frequently been presented to the Board. The question of union agency as it relates to the impact of such statements has been troubling and recurring. As we explain below, the harm resulting from improper fee-waiver statements can be largely avoided by unions undertaking a clear explanation of their policy. The principles set forth today are intended to encourage unions to undertake such explanations so that most *Savair* objections will be obviated.[6]

The record evidence shows that Doug Hanicke, then employed by the Respondent, initiated the organizing campaign by contacting Richard Vaughn, a union representative, about organizing the Respondent's employees. Vaughn said that the Union would become active in the organizational campaign if a sufficient number of employees were interested in union representation. Vaughn then mailed Hanicke about 50 union-authorization cards for employees to sign. The only instruction Hanicke received was that he should not solicit cards "on company time." Three other employees at the time, Robert German, Ron Nickels, and Charles Rachel, joined Hanicke in soliciting cards from their fellow employees. Donald Owens, the Union's organizer, testified that these card solicitors were four of the five persons who "really worked like hell to keep the guys together and everything else." In the course of soliciting their fellow employees to sign, these four employees made a vari-

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[6]To the extent that *Allied Metal Hose Co.*, 219 NLRB 1135, 1143—1146 (1975) (where volunteer employee card solicitors made improper *Savair* statements and the union did not comment on the subject until after the election), *Call-A-Mart*, 214 NLRB 225, 228—229 (1974) (where union representatives did not fully explain the union's initiation-fee-waiver policy and thereafter employees who voluntarily solicited cards on the union's behalf made statements violative of *Savair*), and other like cases are inconsistent with the analysis set forth herein, they are overruled.

ety of statements, as found by the hearing officer, to the effect that if an employee signed a card at some point during the campaign before the election, his union initiation fee would be waived. Such statements, if attributable to the Union, are grounds for overturning the election under *NLRB v. Savair Mfg. Co.*, 414 U. S. 270, 272, 281 (1973).

Section 2(13) of the Act provides that:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Application of this statutory provision leads us to conclude that, in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting.[7] When a union makes authorization cards available to employees with the understanding that they will solicit other employees to sign them, it thereby vests the solicitors with actual authority to obtain signed cards on its behalf. See Restatement 2d, *Agency* (1958). Additionally, when a union permits or acquiesces in employees' soliciting on its behalf without indicating to third parties that such solicitation is unauthorized, it thereby vests the solicitors with apparent authority to obtain signed cards on its behalf.[8] In both cases, whether by action or inaction,

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[7]As set out in Restatement, 2d, *Agency* § 3(2) (1958), "[a] special agent is an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service."

[8]By allowing employees to engage in unfettered solicitation activities and by using the signed cards they obtain to support the

(Footnote Continued on Next Page)

the union has created a special agency relationship for the limited purpose of card solicitation. See Restatement 2d, *Agency* § 3 (1958). Accordingly, the union will de deemed responsible for representations concerning its fee waiver policies made by its special agent solicitors, whether or not they have been specifically authorized or instructed to speak on this subject. See generally Restatement 2d, *Agency* § 161A, 162 (1958).

A union may avoid responsibility for the improper fee-waiver statements of its solicitors, however, by clearly publicizing a lawful fee-waiver policy in a manner reasonably calculated to reach unit employees before they sign cards. Such publicity may take any number of forms including, for example, an explanation of the fee-waiver policy printed on the authorization card itself. A union that fails to take adequate steps to provide the employees with an explanation of its policy acts at its peril.[9]

(Footnote Continued From Preceding Page)

filing of a petition, the union becomes "responsible for the information which comes to the mind of the third person" regardless of whether or not it knows of the specific conduct involved. The union in that situation either has "intend[ed] to cause the [unit employees] to believe that the [solicitor] is authorized to act for [it] or should realize that [the] conduct is likely to create such belief." Restatement 2d, *Agency* § 27 (1958).

[9]Obligating a union to provide employees with a clear explanation of its fee waiver is neither onerous nor unfair. Compared to the entirely avoidable expenditure to time, money, and Board resources attendant to litigating *Savair* objections and holding rerun elections, the burden on a union of publicizing its policy is relatively slight. The union is the party to the election that derives the benefit from card solicitation and is alone in a position to explain authoritatively its fee-waiver policy. By undertaking an effective explanation of its fee-waiver policy, a union may protect the election victory it seeks from attack on *Savair* grounds.

Applying these principles to the facts presented, we find that when Union Business Agent Vaughn mailed 50 authorization cards to Douglas Hanicke with instructions to get them signed, he thereby vested Hanicke with actual authority to engage in solicitation, making Hanicke the Union's special agent for the limited purpose of soliciting cards. By acquiescing in solicitation activities by Nickles, Rachel, and German, the Union vested these three employees with apparent authority to solicit, and likewise rendered them its special agents. All four made improper fee-waiver statements. By virtue of their status as special agents of the Union, their statements were imputable to the Union.[10]

The Union here did not adequately inform the unit employees of a lawful fee-waiver policy. Union Business Agency Vaughn, who gave the cards to employee solicitors, as noted above, gave no instructions with regard to the Union's waiver policy. At most, Vaughn's testimony reveals that at a meeting with employees he may have told them that he would discuss fees after the election. Union Business Agent Owens testified that he "might have" mentioned the Union's fee-waiver policy while meeting with some employees, that he did not see why he "shouldn't of." He testified that in a discussion with employees he may have said he would talk to the Union's district body about

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[10]See *Dollar Rent-A-Car,* 236 NLRB 206, 210 fn. 11 (1978) (where it was found that statements made by an employee the union designated to solicit cards were attributable to the union); *J. C. Penney Co.,* 214 NLRB 445, 452 (1974) (where the Board set aside an election based on improper *Savair* statements made by two employees to whom the union had given cards and instructed to solicit signatures); and *Woodworkers (Central Veneer),* 131 NLRB 189, 190 (1961) (where the Board found that a union had made a nonemployee its agent when it provided him with authorization cards to solicit employees and accepted the results of his efforts by filing a petition based on the signed cards he procured).

reducing fees for the newly organized shop, but could not recall any specific meeting where the matter was discussed. We do not view this as adequate to establish that the effects of the statements of the four solicitors were or could have been neutralized and find that the statements reasonably tended to interfere with the outcome of the election.

Accordingly, we find merit to the Respondent's Objection 1 and deny the General Counsel's Motion for Summary Judgment.

ORDER

It is ordered that the proceeding in Case 14-RC-9383 is reopened and consolidated with the proceeding in Case 14-CA-16116.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied, and the complaint in Case 14-CA-16116 is dismissed.

IT IS FURTHER ORDERED that the Certification of Representative in Case 14-RC-9383 is vacated.

IT IS FURTHER ORDERED that the proceeding in Case 14-RC-9383 is remanded to the Regional Director for Region 14 for the purpose of holding a second election.[11]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because

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[11]Should the Union not wish to proceed to an election, it may withdraw its petition without prejudice to filing a new petition.

they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by District No. 9, International Association of Machinists and Aerospace Workers, AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U. S. 759 (1969). Accordingly, it is directed that an eligibility list containing the names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Direction of Second Election. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D. C. 30 April 1987.

Donald L. Dotson, Chairman

Wilford W. Johansen, Member

Marshall B. Babson, Member

James M. Stephens, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Nos. 1248, 1361, Dockets 83-4002, 83-4020.

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION, - - *Petitioner-Cross-Respondent,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent-Cross-Petitioner,*

AND

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), - - *Intervenor.*

Argued April 26, 1983. Decided July 18, 1983.
Rehearing Denied September 20, 1983.

Employer sought review of National Labor Relations Board order finding it guilty of unfair labor practices and ordering it to bargain with union. Following remand, 658 F.2d 934, the Board again found employer guilty of unfair labor practices and ordered it to bargain with union, and employer petitioned for review, and Board cross-petitioned for enforcement. The Court of Appeals, Metzner, District Judge, sitting by designation, held that where result of the election was 175 for the union and 153 against, and it was shown that 51 employees could possibly have been influenced by the pro-union activity of five group leaders whose status as supervisor was conceded, it could not be said that

the election was held in an atmosphere free not only from interference, restraint or coercion violative of the National Labor Relations Act, but also from other elements preventing or impeding a reasoned choice, and therefore, a new election would be ordered.

Order vacated.

Opinion on rehearing, 718 F.2d 201.

1. Labor Relations Key 211

Determination of whether a supervisor had "major" or "minor" supervisory authority and whether the exercise of supervisor's authority could have an impact on laboratory conditions for voting cannot be made simply by labeling a supervisor as "minor"; instead, consideration of both the extent of supervisor's authority and the extent of his pro-union activity is required. National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152(11).

2. Labor Relations Key 687

On remand of unfair labor practice proceeding, National Labor Relations Board erred in stating that the law of case was that a group leader was a major supervisor only if he possessed the authority to hire, fire, promote, or issue written warnings on his own volition or has the authority to effectively to recommend such action, because nowhere in Court of Appeals' prior opinion was such a ruling made.

3. Labor Relations Key 211

In determining whether supervisor has "major" or "minor" supervisory power, the power to recommend adverse action is not the sole criterion; the power to reward should also be considered, because the authority to grant rewards in the form of transfer, favorable work assignments, selection to work overtime, or excuse from overtime can be just as coercive in the election process as the authority to issue written warnings. National Labor Relations Act, § 2(11), as amended, 29 U.S.C.A. § 152(11).

4. Labor Relations Key 211

Where result of the election was 175 for the union and 153 against, and it was shown that 51 employees could possibly have been influenced by the pro-union activity of five group leaders whose status as supervisor was conceded, it could not be said that the election was held in an atmosphere free not only from interference, restraint or coercion violative of the National Labor Relations Act, but also from other elements preventing or impeding a reasoned choice, and therefore, a new election would be ordered. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

Arnold E. Perl, Memphis, Tenn. (Young & Perl, Memphis, Tenn., Richard M. Kobdish, Memphis, Tenn., on brief), for petitioner-cross-respondent.

Victoria Higman, Atty., N.L.R.B., Washington, D.C. (Howard E. Perlstein, Atty. William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Associate Gen. Counsel and Elliott Moore, Deputy Associate Gen. Counsel, Washington, D.C., on brief), for respondent-cross-petitioner.

Eugene G. Eisner, New York City (Jordan Rossen, Gen. Counsel, M. Jay Whitman and Leonard R. Page, Associate Gen. Counsel, Detroit Mich., on brief), for intervenor.

Before NEWMAN and PRATT, Circuit Judges, and METZNER, District Judge.*

METZNER, District Judge:

ITT Lighting Fixtures, Division of ITT Corporation ("Company") petitions the court to review and set aside a Decision and Order of the National Labor Relations Board

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*The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

("Board") issued on December 16, 1982, finding the petitioner guilty of unfair labor practices and ordering it to bargain with the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("Union"). The Board has cross-petitioned for enforcement of its order. The Union has intervened in support of the Board's petition.

This marks the second appearance of this case before this court. The court's prior decision is reported at 658 F.2d 934, and fully details the factual background. The court will assume familiarity with its prior decision and recount only the essentials.

I. *Prior Proceedings*

On December 14, 1978, the Union filed a representation petition with the Board seeking certification as the exclusive bargaining representative of the Company's production, maintenance and warehouse employees. The Company challenged the inclusion of its groupleaders in the bargaining unit, claiming that they were supervisors within the meaning of Section 2(11) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(11).[1] After a hearing, the Regional Director was unable to determine whether the

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[1]Section 2(11) of the Act, 29 U.S.C. § 152(11), defines "supervisor" as follows:

> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

groupleaders were supervisors, and permitted them to vote by challenged ballot.[2]

The election was held on February 16, 1979, and 362 ballots were cast. Of these, 175 were cast for the Union, 153 were cast against the Union, and 34 were challenged and not counted. Thirty-one of these 34 ballots were cast by groupleaders.

A. *Before the Board*

The Company filed timely Objections to Conduct Affecting the Results of the Election, in which it charged that the groupleaders' open and pervasive pro-union activities tainted the election. After an evidentiary hearing the Hearing Officer sustained challenges to the ballots cast by the groupleaders, finding that they were all supervisors. However, he found that they were "minor" supervisors without real authority to affect the employment status of other employees and concluded that their pro-union activity did not taint the election.

The Regional Director reviewed the Hearing Officer's determination, and sustained the Company's challenges to only eleven of the groupleaders' ballots, finding the record inconclusive with respect to the authority of the other groupleaders. He found it unnecessary to determine the status of the remaining groupleaders because their votes would not have affected the outcome of the election. He disposed of the Company's charge that the groupleaders' pro-union activity tainted the election by concluding that, "assuming arguendo," all 31 were supervisors, the groupleaders were "minor" supervisors without real authority to affect the employment status of other employees.

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[2]The Board denied the Company's request that it review the Regional Director's failure to exclude the groupleaders.

The Board granted review of the Regional Director's decision solely on the issue of whether the remaining groupleaders were supervisors. It found four additional groupleaders to be supervisors, and left unresolved the status of the remaining 16 because "their ballots cannot affect the election result . . . ." The Board adopted the remaining findings and conclusions of the Regional Director and certified the election.

The Company then refused to bargain with the Union. On September 26, 1980, the Board found the Company to be in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and ordered the Company to bargain with the Union.

B. *Before This Court*

The case then came before this court on the Company's petition for review of the Board's order and the Board's cross-petition for enforcement. After reviewing the administrative proceedings in detail, the court concluded that the Board, and its designated finders of fact, had avoided the crucial issue: whether the pro-union statements and activities of many of the Company's groupleaders impaired the employees' freedom of choice in the election, and affected any of the 175 pro-union votes cast. *ITT Lighting Fixtures, Division of ITT Corporation v. NLRB*, 658 F.2d 934, 940 (2d Cir. 1981).

The court noted that such pro-union activity "involves the possibility that such conduct could coerce an employee into supporting the union out of fear of future retaliation . . . .'" *Id.* at 937, quoting *Turner's Express, Inc.*, 189 N.L.R.B. 106, 107 (1971). The court read the Board's decisions to require, in the absence of direct threats of retaliation, consideration of two factors: (1) the degree of supervisory authority, and (2) the extent, nature and openness of the pro-union activity.

The court pointed out that the Board had adopted the Regional Director's conclusion that the group leaders were "minor" supervisors without the authority to affect the employment status of other employees. There had been no analysis of the difference between "major" and "minor" supervisors and no explanation of what factors were considered in making the distinction. The Regional Director and the Board reached this conclusion about all the groupleaders, despite the fact that they found the evidence insufficient or inconclusive as to whether some of them were supervisors at all.

Thus, the court concluded it could not defer to the Board's ultimate judgment because it was not "supported by essential findings relative to two issues: first, whether, based upon the evidence and findings of fact reached thereon, the groupleaders or any of them who engaged in pro-union activity during the critical period were 'supervisors,' setting forth the criteria for such; and then, if so, whether their pro-union activity could effectively affect the votes of the employees." *Id.* at 940.

The court remanded the case to the Board for further fact-finding and analysis consistent with its opinion and the Board's decisions in the cases of *Delchamps, Inc.*, 210 N.L.R.B. 179 ((1974), and *Flint Motor Inn Company, d/b/a Sheraton Motor Inn*, 194 N.L.R.B. 733 (1971). The question of law to be decided was whether the groupleaders' conduct reasonably tended to have a coercive effect on the employees so that it was likely to have impaired their freedom of choice in the election.

C. *The Board's Supplemental Decision*

The Board issued a Supplemental Decision and Order on December 16, 1982,[3] in which it concluded that:

> "[T]here was no danger that a prounion group leader bent on retaliation could accomplish that end .... The type of day-to-day supervisory authority possessed by these group leaders simply did not afford the opportunity for effective retaliation against anti-union employees .... Accordingly, we affirm our earlier holding that the prounion statements and activities of the group leaders did not reasonably tend to coerce employees and impair the employees' freedom of choice so as to justify setting the election aside."

The Board found this result to be consistent with its decisions in *Delchamps, supra* and *Flint Motor Inn, supra,* because the respective supervisors in those cases exercised "major" supervisory authority, such as the authority to hire and discipline.

II. *Discussion*

[1] At the outset it should be noted that, contrary to the Board's statement, this court on the prior review did not approve an automatic conclusion that a supervisor's conduct might or might not affect voting based on a distinction between "major" and "minor" supervisory authority. The court said at 941:

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[3]The Board had originally directed that the record be reopened and a hearing held before an ALJ for additional findings of fact. Upon motion by the Company the Board rescinded the order reopening the record, agreeing that the existing record was sufficient. *See ITT Lighting Fixtures, Division of ITT Corporation* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW),* 265 N.L.R.B. 188 (1982).

> "None of these cases [cited by the Hearing Officer] are helpful in shedding light on the meaning of the major supervisor/minor supervisor distinction."

The court was not interested in what labels were used. It wanted to know the criteria developed by the Board for determining whether a supervisor was "major" or "minor," and whether the exercise of a supervisor's authority could have an impact on the laboratory condition for voting. That determination cannot be made, as the Board has done, simply by labeling a supervisor as "minor"; instead there must be consideration of both the extent of the supervisor's authority and the extent of his pro-union activity.

[2] The Board is further in error when it states that the law of this case is "that a groupleader is a major supervisor only if he possesses the authority to hire, fire, promote, or issue written warnings on his own volition, or has the authority effectively to recommend such action." Nowhere in this court's prior opinion was such a ruling made.

[3] The statute defines "supervisor" as one having authority "to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U.S.C. § 152(11). The Board's position is that the distinction between "major" and "minor" is based on the power to recommend *adverse* action because only that power gives the supervisor the retaliatory potential "sufficient to make their extensive involvement in a union campaign coercive upon employees."

It seems clear that in addition to the Board's criteria, which are based solely on the power to retaliate, there should be included the power to reward. This power consists of giving one employee an advantage over another.

The authority to grant rewards in the form of transfer, or favorable work assignments, or selection to work overtime to make more money, or excuse from overtime, can be just as coercive in the election process as the authority to issue written warnings.

The Board itself in its decisions in *Delchamps, supra,* and *Flint Motor Inn Company, supra,* regarded the authority to select employees for overtime and to schedule work as indications of significant authority. In its Supplemental Order, however, the Board did not even mention the authority to select employees for overtime in its discussion of Joan Carson, and placed no importance on it in its discussions of John McNeely, Vernal Massey, Jessie Merriweather, George McGhee, Jeannette Millington, Sammie Williams or Barry Williams, except to note in Merriweather's case that requests to avoid overtime were seldom denied. There was evidence, to which the Board does not allude, that when such requests were denied because a replacement could not be found, it was the groupleader who selected the employees required to work.

[4] We turn now to the 15 groupleaders whose status as supervisors is conceded. We are not concerned with whether their votes would have affected the outcome since those ballots were not counted. The result of the election was 175 for the Union and 153 against. A switch of 12 pro-union votes to votes against the union would change the result.

The question is whether these supervisors might have affected the result because of the nature of their authority and the extent of their union activity.

The testimony shows that Massey, McNeely, Millington and Barry Williams supervised a total of 31 employees and possessed more than minimal authority to reward employees. They encouraged employees to support their pro-union position. Several others possessed the authority but merely

attended the meetings. Obviously, mere attendance at meetings will not support an inference of coercion.

Joan Carson was a groupleader of 20 employees. She had the authority to select employees for overtime. The Board denigrates her power to recommend adverse action. Carson could issue oral warnings. Her supervisor said he would issue a written warning on her recommendation, but would first check the employee's file to see if Carson had issued an oral warning. The Board said, "Accordingly, we find that Carson's recommendations of written reprimands were adopted only after independent investigation, and therefore she did not exercise major supervisory authority."

Merely checking a file to ascertain whether the groupleader had issued a prior oral warning cannot possibly be characterized as an "independent investigation" of the complaint. Futhermore, the Board's conclusion is inconsistent with the Act, which includes as supervisors those with power "effectively to recommend" adverse or favorable action, provided only that they exercise independent judgment in making the recommendation. 29 U.S.C. § 152(11). The Act does not preclude supervisory status simply because the recommendation is subject to a superior's investigation.

On this record it has been shown that 51 employees could possibly have been influenced by the pro-union activity of five of the groupleaders. Thus, we cannot say that the election was held in an atmosphere " 'free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.' " *ITT Lighting Fixtures*, 658 F.2d at 936, quoting *Sewell Manufacturing Company*, 138 N.L.R.B. 66, 70 (1962). A switch of only twelve votes would have changed the result of this election, and therefore it appears that a new election should be held. Since the Board has failed to avail itself of two opportunities to demonstrate the validity of its order, we conclude that the order should now be vacated.

The supplemental order issued on December 16, 1982, and reported at 265 N.L.R.B. 188 is vacated, the cross-petition for enforcement of the supplemental order is denied, and the election, which resulted in certification by the NLRB of the Union as the collective bargaining representative of the Company's employees, is set aside.

COURT OF APPEALS UNITED STATES

THIRD CIRCUIT

Nos. 80-2245, 81-1319.

JAMESWAY CORPORATION, - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent,*

DISTRICT 65, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent,*
JAMESWAY CORPORATION, - - - - *Intervenor.*

Argued October 30, 1981.
Decided March 31, 1982.

Employer filed petition for review of the National Labor Relations Board's order that it cease and desist in its violations of the National Labor Relations Act and recognize and bargain with union upon request. Employer challenged the validity of the representation election and the legality of the union certification. Union filed petition to set aside that part of the Board's order denying special relief sought by the union. Board also cross-applied for enforcement of its orders. The Court of Appeals, Rosenn, Circuit Judge, held that distribution of union's representation campaign handbill just before the representation election which falsely created the impression that unless

union were elected, newly hired workers faced risk of layoff warranted setting aside of the election.

Ordered accordingly.

Sloviter, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Labor Relations Key 680

Although under the substantial evidence test a court is not free to substitute its view for that of the National Labor Relations Board merely because it would have reached a different conclusion had it considered the question initially, reviewing court is not barred from setting aside a board decision when it cannot conscientiously find the evidence supporting that decision is substantial, when viewed in light that the record in its entirety furnishes, including body of evidence opposed to the Board's view. National Labor Relations Act, §§ 8(a)(1, 5), 10(e, f) as amended 29 U.S.C.A. §§ 158(a)(1, 5), 160(e, f).

2. Labor Relations Key 680

Abuse of discretion standard is inapplicable to judicial review of decision of National Labor Relations Board regarding whether particular incident impermissibly interfered with conduct of an election; rather, in determining whether a particular incident so disrupted an election as to warrant setting the election aside, court must satisfy itself that the National Labor Relations Board's determination regarding the impact of the incident at issue is supported by substantial evidence in the record considered as a whole. National Labor Relations Act, §§ 8(a)(1, 5), 10(e, f) as amended 29 U.S.C.A. §§ 158(a)(1, 5) 160 (e, f).

3. Labor Relations Key 215

Distribution of union's handbill just before representation election which falsely created impression that unless

union were elected, newly hired workers faced risk of layoff warranted setting aside election, in that handbill's message was not simply general representation that union could better protect job security of employees, but indicated that employer's specific failure to guarantee job security of its employees, a promise employer could not lawfully have made on eve of election, demonstrated that jobs of newly hired employees were imperiled by union protection, balloting was extremely close, and employer did not have time to respond effectively to handbill's distribution. National Labor Relations Act. §§ 8(a)(1, 5), 10(e, f) as amended 29 U.S.C.A. §§ 158(a)(1, 5), 160(e, f).

Franklin H. Goldberger, Novak & Goldberger, Schenectady, N.Y., Peter G. Nash (argued), Michael J. Barlett, Ogletree, Deakins, Nash, Smoak & Stewart, Washington, D.C., for Jamesway Corp.

William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, Richard B. Bader, Judith A. Dowd, Carol De Deo (argued), Attys., N.L.R.B., Washington, D.C., for respondent.

Ira Jay Katz, Philadelphia, Pa., Jonathan H. Siegel, Washington, D.C., for District 65.

Before Adams, Rosenn and Sloviter, Circuit Judges.

OPINION OF THE COURT

Rosenn, Circuit Judge.

These cases present two petitions for review and cross-applications for enforcement of an order of the National Labor Relations Board (Board) finding Jamesway Corporation (Jamesway or Store) to have violated section

8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(1) & (5) (1976), by refusing to bargain with District 65, UAW (Union). In No. 80-2245, Jamesway filed a petition under 29 U.S.C. § 160(f) (1976) for review of the Board's order that Jamesway cease and desist in its violations and recognize and bargain with the Union upon request. Jamesway challenges the validity of the representation election and the legality of the Union's certification. Because Congress has not provided for direct review of Board representation proceedings, Jamesway was compelled to expose itself to the unfair labor practice charges in order to obtain judicial review of the representation proceedings, review which this court appropriately should now provide. *See Pittsburgh Plate Glass Co.* v. *NLRB,* 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251 (1941); *Anchor Inns, Inc.* v. *NLRB,* 644 F. 2d 292 (3d Cir. 1981); *NLRB* v. *Sun Drug Co.,* 359 F. 2d 408 (3d Cir. 1966). The Board has cross-applied for enforcement of its order under 29 U.S.C. § 160(e) (1976). In No. 81-1319, the Union has petitioned this court to set aside that part of the Board's order denying the special relief sought by the Union. The Board has also cross-applied for enforcement of its order in this action. Jamesway's petition for review will be granted; the Board's application for enforcement and the Union's petition to modify the Board's order will be denied.

I.

Jamesway, a New York corporation, operates a department store in Hammonton, New Jersey. On April 2, 1979, the Union filed a representation petition seeking certification as the bargaining representative of the Store's em-

ployees.[1] The Regional Director (RD) determined that the appropriate bargaining unit included:

> All full-time and regular part-time employees, including leased department employees, office clerical employees, department heads, stockroom employees, head cashier, C.I.E. employees and TWX operator at the Employer's store # 32 Hammonton, New Jersey facility, but excluding management trainees, casual and seasonal employees, security employees, leased department managers, head receiver, guards and supervisors within the meaning of the Act and First Federal Savings and Loan Association employess.

Jamesway contested the inclusion in the unit of three employees: the Store's head cashier and two students employed under the auspices of New Jersey's Cooperative Industrial Education Program.[2] The Board refused to review Jamesway's pre-election objections to the RD's unit determination, concluding that no substantial issues warranting review had been raised.

The election was held on June 22, The initial tally of ballots revealed 28 votes for the Union, 29 against, and 6 challenged ballots. Jamesway filed timely objections to the election and to conduct of the Union which the Store maintained improperly affected the election's outcome.

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[1]The petition described the bargaining unit which it sought to represent as including "all production, shipping and receiving, janitors, cashiers, office personnel, inventory control, [and] sales" employees at Jamesway Store No. 32. Excluded from the unit were "guards and supervisors under the act."

[2]The New Jersey Department of Education administers its Cooperative Industrial Education Program, a work-study program for vocational secondary school students, in coordination with various local school boards. The program is designed to educate high school students in particular occupations and provide them with vocational skills prior to graduation.

Jamesway raised several grounds to have the election set aside.[3] Consideration of one of these, namely Jamesway's claim that campaign literature circulated by the Union on the eve of the election was so deceptive as to impermissibly interfere with the election, is sufficient to determine the disposition of this case.

The RD conducted an administrative investigation of the challenges to the ballots and the objections to the election-related conduct. *See generally* 29 C.F.R. § 102.69 (1981). On October 26, 1979, he issued a Supplemental Decision on Challenged Ballots and Objections to Election in which he overruled four of the six challenges and all of Jamesway's objections. Jamesway filed a request for review of that decision, contending that the RD erred in overruling the Store's objections, a request that the Board denied. On January 4, 1980, the RD issued a Revised Tally of Ballots which showed 32 votes for the Union and 29 against the Union, with 2 ballots challenged by the Union remaining uncounted, the challenges unresolved, because the votes were not determinative of the outcome of the

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[3]In addition to objecting to the last-minute circulation of a handbill, *see infra*, the employer also contends that:

1. The Board improperly included in the bargaining unit the head cashier and two students working under New Jersey's Cooperative Industrial Education Program, all of whom, it argues, were ineligible to vote.

2. A union committeeman and other union adherents engaged in threats of physical violence and intimidation of employees in the bargaining unit.

3. Employees were threatened by a union committeeman that if they did not support the Union prior to the election their initiation fees would be higher when they joined afterward.

4. The union organizing committee engaged in polling misconduct which interfered with a free and fair election.

election. The RD certified the Union as the exclusive bargaining agent of the Store's employees on January 10.

Jamesway refused to bargain in order to contest the certification, and on May 12, 1980, the RD issued a complaint charging Jamesway with engaging in unfair labor practices within the meaning of section 8(a)(1) and (5) of the Act. The Board ultimately issued its Decision and Order on August 27, 1981. It refused to consider Jamesway's challenges to the certification and ordered Jamesway to bargain with the Union.

II.

[1] As an initial matter we must determine the appropriate standard of judicial review of the Board's opinion and order. Some confusion appears to have developed regarding selection of the appropriate standard for reviewing the Board's determinations regarding the effect of alleged misconduct on the fairness of an election. Generally, when the Board petitions for enforcement of a bargaining order or a party challenges a Board determination that he engaged in an unfair labor practice, a reviewing court is bound to accept the Board's factual findings "if supported by substantial evidence on the record considered as a whole." 29 U.S.C. § 160(e) & (f), *see Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951); *E. L. Wiegand Division, Emerson Electric Co.* v. *NLRB*, 650 F. 2d 463, 468 (3d Cir. 1981); *Hedstrom Co.* v. *NLRB*, 629 F. 2d 305, 313-14 (3d Cir. 1980) (en banc), *cert. denied*, 450 U. S. 996, 101 S. Ct. 1699, 68 L. Ed. 2d 196 (1981). The degree of review authorized under the substantial evidence test has been likened by the Supreme Court to the judgment that a trial judge exercises on whether or not there is sufficient evidence to submit the case to the jury:

> [Substantial evidence] "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclussions sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. *NLRB*, 340 U. S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951) (quoting *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660 (1939)). Thus, "'[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp., supra*, 340 U. S. at 477, 71 S. Ct. at 459 (quoting *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 229 59 S. Ct. 206, 216 83 L. Ed. 126 (1938)). Although under the substantial evidence test a court is not free to substitute its view for that of the Board merely because it would have reached a different conclusion had it considered the question initially, *Universal Camera Corp., supra*, 340 U. S. at 488, 71 S. Ct. at 464, "a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view." *Id.*

The Board argues, however, that a more deferential standard of review governs when a court is called upon to review a decision of the Board regarding the conduct of an election. In such circumstance, the Board maintains, the proper standard addresses "whether the Board acted arbitrarily in the exercise of its discretion." *NLRB* v. *Pinkerton's Inc.*, 621 F. 2d 1322, 1324 (6th Cir. 1980); *see NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330, 67 S. Ct. 324,

327, 91 L. Ed. 322 (1946). Accordingly, in the instant case the Board urges that the proper standard for reviewing its actions in conducting and certifying the election is whether the Board's actions were within its wide range of discretion.[4]

The Board in its attempt to limit the power of review exercised by this court over the Board's determinations regarding the conduct of elections confuses the standard of review a court should use to examine the propriety of election procedures and policies established by the Board with the standard appropriate for review of the Board's application of those procedures and policies to specific elections. That confusion is understandable, since our decisions have not carefully articulated the distinction. Nonetheless, the substantial evidence standard remains the proper one under which Board determinations regarding the impact of alleged misconduct on the fairness of an election must be judged.

The source of the abuse of discretion standard which the Board would have us apply is *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 67 S. Ct. 324, 91 L. Ed. 322 (1946). *A. J. Tower Co.* involved a challenge to a decision of the NLRB to apply strictly its rule that any challenges to a voter's eligibility have to be made before the election is

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[4]The abuse of discretion standard of review which the Board urges on us entails a greater degree of judicial deference to agency action than does substantial evidence review. Under the latter standard, a reviewing court must assure itself that substantial evidence supports an agency's findings. *See supra* majority opinion at 66. In contrast, "[a]buse of discretion may be found 'only if there is no evidence to support the decision or if the decision is based on an improper understanding of the law.' " *Jaimez-Revolla* v. *Bell*, 598 F. 2d 243, 246 (D.C. Cir. 1979) (per curiam) (quoting *Song Jook Suh* v. *Rosenberg*, 437 F. 2d 1098, 1102 (9th Cir. 1971)).

held. In noting the "wide discretion" enjoyed by the Board "in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," 329 U. S. at 330, 67 S. Ct. at 327, the Court was simply acknowledging the deference to be accorded the Board in promulgating rules and regulations which implement its statutorily created supervisory role. The Court was not called upon to review whether a particular challenge had been timely filed, a question of fact accepted by all the parties, but rather the validity of the Board's uniform policy of prohibiting post-election challenges as a way of preventing election fraud. And there is no indication that the Court intended to displace the substantial evidence standard of review which under 29 U.S.C. § 160(e) & (f) is to be applied by courts of appeals to the Board's findings of fact. Thus, *A. J. Tower Co.*, accords the NLRB wide discretion in formulating election procedures; it does not thereby limit court of appeals review of Board determinations concerning election conduct to the more restrictive abuse of discretion standard.

Although *A. J. Tower Co.* dealt only with the proper standard of review of Board procedures and policies, judicial decisions reviewing the Board's determinations as to whether those procedures and policies had been respected in a particular case have made reference to the *A. J. Tower Co.* standard even as they have applied the substantial evidence standard. For example, in *NLRB* v. *El-Ge Potato Chip Co.*, 427 F. 2d 903 (3d Cir. 1970), *cert. denied*, 401 U. S. 909, 91 S. Ct. 869, 27 L. Ed. 2d 807 (1971), we noted, relying on *NLRB* v. *A. J. Tower Co.*, *supra*, that "[i]t was long ago settled that the Board is entrusted with a 'wide degree of discretion' in establishing and enforcing the procedure and safeguards necessary to insure the fair and free choice by employees of their bargaining representatives." 427 F. 2d at 906 (footnote

omitted). We concluded nonetheless that the question at issue was whether "the Board's finding *that the election was fairly conducted* is supported by substantial evidence in the record considered as a whole." *Id.* (footnote omitted) (emphasis added).[5] *Accord, NLRB* v. *Pinkerton's,*

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[5]The concurring and dissenting opinion approves of a narrower formulation of this standard of review, which appears to give the Board "broad discretion" in determining the effect of pre-election activity on an election and limits our "substantial evidence" review to the narrower category of "findings of facts," which I take to mean the narrative facts on which the Board's determination is based. To be extent that this formulation of the standard insulates Board determinations of the effect of alleged misconduct on an election from substantial evidence review it is contrary to the law of this circuit and unduly limits the review function of this court.

Our decisions consistently demonstrate that our review of "factual findings" in an unfair labor practice case under 29 U.S.C. § 160(e) & (f) is not limited to ascertaining whether the facts were as found by the Board, but extends to review of the correctness of the Board's determination whether those facts established that an unfair labor practice had been committed. *See, e.g., Hedstrom Co.* v. *NLRB,* 629 F. 2d 305, 313-19 (3d Cir. 1980) (en banc), *cert. denied,* 450 U. S. 995, 101 S. Ct. 1699, 68 L. Ed. 2d 196 (1981); *Wheeling-Pittsburgh Steel Corp.* v. *NLRB,* 618 F. 2d 1009, 1016-21 (3d Cir. 1980); *Electrical Prod. Div. of Midland-Ross Corp.* v. *NLRB,* 617 F. 2d 977, 983 (3d Cir. 1980). That the pre-election conduct at issue here is not the basis for the unfair labor charge, but is rather raised in defense to the charge that Jamesway has failed to bargain with the Union, does not alter the standard of review. 29 U.S.C. § 160(f) specifically subjects to substantial evidence review findings of fact that a petitioner believes demonstrate that no unfair labor practice has been committed. In the context of a challenge to the certification of a union following an election, the Board's determinations that certain conduct did or did not comport with its standards for a fair election are thus made subject to substantial evidence review. *NLRB* v. *El-Ge Potato Chip Co., supra,* 427 F. 2d at 906.

Inc., 621 F. 2d 1322, 1324 (6th Cir. 1980); *NLRB* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 29 (5th Cir. 1969).[6]

We have also applied the substantial evidence standard of review to Board determinations regarding the impact of alleged misconduct on an election without reference to *A. J. Tower Co.* Thus in *Zeigler Refuse Collectors, Inc.* v. *NLRB*, 639 F. 2d 1000, 1005 (3d Cir. 1981), we indicated that "[t]he Board must examine the record, determine the weight to be accorded each factor, and applying its experience, arrive at a final, articulated decision supported by substantial evidence." We also appear to have applied the substantial evidence test *sub silentio*. In *NLRB* v. *Campbell Products Department*, 623 F. 2d 876, 879 (3d Cir. 1980), we indicated that "[t]he Board has wide discretion in evaluating the circumstances surrounding an election and determining whether these circumstances allowed a free and fair choice by the voters." The "wide discretion," however, referred to the appropriateness of the Board's policy of distinguishing "between electioneering by an agent or representative of a *party* to an election, on which the Board takes a strict view, and electioneering by a mere rank and file employee, of which it is more tolerant." *Id.* (citations omitted). Having approved, under an abuse of discretion standard, the Board's rule that electioneering by parties should be less tolerated than electioneering by nonparties in order to safeguard the election process, we went on to conclude that the Board's "distinction amply supports the Board's conclusion that the electioneering in the instant case, which was undertaken by a mere employee, did not warrant setting aside the election." *Id.*

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[6]The First Circuit, in contrast, employs an abuse of discretion standard in reviewing Board determinations concerning the conduct of elections. See *Melrose-Wakefield Hosp. Ass'n* v. *NLRB*, 615 F. 2d 563, 566-67 (1st Cir. 1980).

[2] In only one case have we actually applied what we termed an "abuse of discretion" standard to our review of election challenges, *see Monmouth Medical Center* v. *NLRB*, 604 F. 2d 820, 821 (3d Cir. 1979).[7] Yet even in that case, we noted that "the Board has 'wide discretion' in establishing *the procedures and safeguards for conducting representation elections*," *id.* at 825 (emphasis added), and went on to observe that "[i]n reviewing a Board decision, we may not 'abdicate' our responsibility to assure 'that the Board keeps within reasonable grounds.'" *Id.* (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490, 71 S. Ct. 456, 465, 95 L. Ed. 456 (1951)). Assuring the reasonableness of the Board's determination is precisely what is required under the substantial evidence test, which we now reaffirm is to be applied to Board determinations regarding the effect of alleged misconduct of an election In determining whether a particular incident so disrupted an election as to warrant setting the election aside, a court must satisfy itself that the Board's determination regarding the impact of the incident at issue is supported by substantial evidence on the record considered as a whole.

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[7]There are other decisions which loosely refer to the Board's "wide discretion" in conducting elections but do not apply that standard of review to Board determinations regarding the conduct of elections. *See Wells Fargo Guard Serv.* v. *NLRB*, 659 F. 2d 363, 370 (3d Cir. 1981) ("The Board has ' "wide discretion" ' in conducting representation elections. However, where, as here, an election is close, 'closer scrutiny of objections may be required of the Board.' ") (footnote and citations omitted); *Vitek Elect., Inc.* v. *NLRB*, 653 F. 2d 785, 787 (3d Cir. 1981) ("Our review is essentially a review of the Regional Director's post-election findings and conclusions as adopted by the Board."); *Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d 292, 295-96 (3d Cir. 1981) ("Courts, sharing only indirectly in the responsibility for monitoring [the] election process, have afforded the Board a 'wide degree of discretion' in the conduct of the election and the attendant proceedings.").

III.

One of Jamesway's principal objections is directed to the circulation of a campaign handbill. On the eve of the election, several members of the Union's organizing committee presented Jamesway with a document which read:

> We, the District 65 organizing committee would like a guarantee in writing that the Company will not lay-off or reduce any of the work force of Jamesway Store #32 after the election or in the future.
>
> District 65 Organizing Committee

When Jamesway refused to sign it, the members of the committee distributed copies of the document, both that same evening and the morning of the election, marked with a distinctive notation:

> Mr. Madison & Mr. Christo *Refused* to signed [sic] this in order to protect the New Worker Hired in the Last 3 or 4 Mo.

While distributing the handbill, one committee member told an employee that the Store's refusal to sign the "guarantee" demonstrated that the new employees would be laid off. Moreover, as a result of the handbill, several newly hired employees expressed concern that they would lose their jobs. Jamesway objected that the last minute circulation of the handbill coerced and intimidated employees into voting for the Union. Although the RD found that the timing of the handbill's distribution precluded the Store from effectively responding, he concluded that the handbill was unobjectionable because it was literally true, i.e. Jamesway had in fact refused to sign the document. The RD therefore overruled Jamesway's objections.

The Board and the courts have evolved criteria for evaluating whether misstatements made prior to an elec-

tion warrant setting the election aside. As this court has noted, the Board's position on deceptive campaign statements is that although a certain degree of hyperbole, intemperance, and inaccuracy is tolerated in campaign propaganda, an election will be set aside if three conditions are satisfied:

> A material fact has been misrepresented; opportunity for reply has been lacking; and the misrepresentation has had an impact on the free choice of the employee.

Aircraft Radio Corp. v. *NLRB,* 519 F. 2d 590, 593 (3d Cir. 1975) (citing *Linn* v. *United Plant Guard Workers, Local 114,* 383 U. S. 53, 60, 86 S. Ct. 657, 661, 15 L. Ed. 2d 582 (1966)); *Hollywood Ceramics Co.,* 140 N.L.R.B. 221, 224 (1962) (*cited with approval in Linn* v. *United Plant Guard Workers, supra*).[8]

The RD found, and the Board now argues before this court, that because the statement which appeared on the handbill was literally true—Jamesway's management did refuse to promise on the eve of the election that it would not lay off workers—the necessary predicate for a violation, namely the misstatement of a matreial fact, is lacking. The Board's position misapprehends the problem posed by the Union's handbill. For the message that was plainly implicit in the handbill, and indeed in some cases orally made explicit, was that recently hired employees risked the loss of their jobs unless the Union were voted in. The juxtaposition of the unsigned promise not to reduce Jamesway's workforce and the Union's skewed construction of that refusal for "the New Worker Hired in the Last 3

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[8]The Board overruled *Hollywood Ceramics Co.* in favor of a much more deferential posture in *Shopping Kart Food Mkt., Inc.,* 228 N.L.R.B. 1311 (1977), but quickly re-embraced the *Hollywood Ceramics* standard in *General Knit of California, Inc.,* 239 N.L.R.B. 619 (1978).

or 4 Mo." could not be otherwise understood. In effect, the Board asks us to hold that the literal truth of the Union's written commentary on the unsigned document immunizes the handbill's overreaching message from judicial scrutiny.[9] We decline to take so rigid an approach.

The Board advances two additional arguments in support of its position that the court should not find the handbill sufficiently deceptive to establish a misrepresentation under *Aircraft Radio Corp.* First, relying on *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), it argues that even if the handbill may have been subject to the interpretation advanced by Jamesway, the mere fact that a message is "subject to different interpretations will not suffice to establish such misrepresentation as would lead [the Board] to set [an] election aside." *Id.* at 224 (footnote omitted). By its plain language, however, *Hollywood Ceramics* establishes that it is messages that are ambiguous because "inartistically or vaguely worded" that may withstand a challenge because subject to more than one interpretation. As noted above, the comment appended to Jamesway's unsigned promise was neither inartistic nor vague; it was precise and pointed.

Finally, the Board suggests that in any event the Union was under no obligation to correct misunderstandings that may have arisen from the handbill. For this last proposition the Board relies on *NLRB* v. *Pinkerton's, Inc.*, 621 F. 2d 1322 (6th Cir. 1980). That reliance is unavailing.

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[9]The inequity of refusing to evaluate the effect of the handbill on the imminent election because of its literal truth is heightened because Jamesway could not have signed the document without violating the Act. Not only would signing the agreement have been tantamount to bargaining with the Union in the face of a pending election, such an action would have amounted to a promise of a material benefit made on the eve of an election and thus would have constituted an unfair labor practice.

The *Pinkerton* court did note, as quoted to us by the Board, that in that case

> The employer admitted the statements . . . were literally true, but claimed the statements were misleading for failure to give more facts or put the statements in context. The Union does not have to give more information which would make the statements unmistakably clear.

Id. at 1327. The *Pinkerton* court continued, however, "As the employer had time to respond to the statements in the earlier letters, the Regional Director properly held they did not warrant setting aside the election." *Id.* Moreover, because the employer did not have time to respond to another objectionable union statement regarding the company's profits, the court ultimately refused to uphold the election. *Id.* at 1329.[10]

[3] In sum, we conclude that the Union's handbill falsely created the impression that unless the Union were elected, newly hired workers faced the risk of layoff.

It is not enough that campaign literature has misrepresented certain facts to justify setting aside an election. Rather, the misrepresentation must have related to a material fact and must have had an impact on the free choice of the employee. *Aircraft Radio Corp.* v. *NLRB, supra.*

In determining what kinds of misrepresentations are sufficiently material to warrant setting aside an election, courts have been particularly willing to intervene and over-

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[10]To the extent that *NLRB* v. *Pinkerton's, Inc., supra,* may be read to support the Board's contention that the literal truth of a statement may not be the basis of any misunderstanding, we reject it. Indeed,

> A truth that's told with bad intent Beats all the Lies you can invent.

W. Blake, "Auguries of Innocence," lines 53 & 54.

rule Board certification of an election when the misrepresentation concerned matters which touch on the heart of the collective bargaining process: whether employees will fare better with or without the union as their bargaining representative. Accordingly, courts have not hesitated to deny enforcement of a bargaining order where prior to an election the union significantly misrepresented its ability to improve the earning power of workers if they voted in the union, *see, e.g., J. I. Case Co.* v. *NLRB,* 555 F. 2d 202 (8th Cir. 1977); *Howard Plating Industries* v. *NLRB,* 635 F. 2d 532 (6th Cir. 1980) (per curiam); *Cross Baking Co.* v. *NLRB,* 453 F. 2d 1346 (1st Cir. 1971), or the profitability of the company from whom wage demands are extracted, *see, e.g., Vitek Electronics, Inc.* v. *NLRB,* 653 F. 2d 785 (3d Cir. 1981); *Argus Optics* v. *NLRB,* 515 F. 2d 939 (6th Cir. 1975).

Another factor, only sometimes alluded to by the decisions, which we believe properly animates a court's inquiry into the impact of electioneering misrepresentations on an election is the closeness of the balloting results. *See Cross Baking Co.* v. *NLRB,* 453 F. 2d 1346, 1350 (1st Cir. 1971). The closer the outcome, the less solicitous a court should be of campaign misrepresentations. *Compare Cross Baking Co.* v. *NLRB,* 453 F. 2d 1346 (6th Cir. 1971), and *Aircraft Radio Corp.* v. *NLRB,* 519 F. 2d 590 (3d Cir. 1975) (close vote—enforcement denied), with *NLRB* v. *Sumter Plywood Corp.,* 535 F. 2d 917 (5th Cir. 1976), *cert. denied,* 429 U. S. 1092, 97 S. Ct. 1105, 51 L. Ed. 2d 538 (1977), and *NLRB* v. *Sauk Valley Manufacturing Co.,* 486 F. 2d 1127 (9th Cir. 1973) (union won by large margin—enforcement granted.)[11]

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[11]This does not mean of course that misrepresentations warrant denying enforcement of a bargaining order only in close elections. *See Schneider Mills, Inc.* v. *NLRB,* 390 F. 2d 375 (4th Cir. 1968) (en banc).

The last factor which the Board, and on review of this court, considers in evaluating the effect of deceptive campaign statements on an election is the opportunity of the party to respond to the misrepresentation. Although an opportunity to respond does not alone prevent misleading campaign literature or statements from invalidating an election, *see Aircraft Radio Corp.* v. *NLRB*, 519 F. 2d 590 (3d Cir. 1975), usually if a party is afforded ample time to effectively respond to misrepresentations, the misrepresentations will not constitute grounds to set aside an election. *Warner Press, Inc.* v. *NLRB*, 525 F. 2d 190, 195 (7th Cir. 1975), *cert. denied*, 424 U. S. 943, 96 S. Ct. 1410, 47 L. Ed. 2d 348 (1976).

Evaluating the circumstances of this case against the factors enumerated above, we conclude that there does not exist substantial evidence on the record to support the Board's conclusion that circulation of the handbill did not warrant setting aside the election. We have already concluded that despite the veracity of the handbill, its plain message misrepresented the effect on recently hired employees of voting down the Union. The issue raised in the handbill—the job security of newly hired employees—concerns, as does the question of wages, matters at the heart of an employee's decision whether to support a union. The handbill's message was not simply a general representation that the Union could better protect the job security of employees. *Cf. NLRB* v. *Sauk Valley Manufacturing Co.*, 486 F. 2d 1127 (9th Cir. 1973). Rather, the handbill indicated that Jamesway's specific failure to guarantee the job security of its employees in writing—a promise Jamesway could not lawfully have made on the eve of the election, *supra* note 9—demonstrated that the jobs of newly hired employees were in peril without union protection. More-

over, the balloting in this case was extremely close.[12] Finally, the RD found that Jamesway did not have time to respond effectively to the handbill's distribution. As a result, "employees not otherwise disposed to support the union could well [have] conclude[d] that a union would be their only source of protection, thus interfering substantially with their free and untrammeled choice." *Schneider Mills, Inc.* v. *NLRB,* 390 F. 2d 375, 379 (4th Cir. 1968) (en banc).

None of the decisions cited by the Board in which elections were upheld against challenges based on pre-election misrepresentations involved situations where all of the elements of *Aircraft Radio Corp.* were satisfied. In some the alleged misstatements were not found to be material because they were merely vague puffery, *see NLRB* v. *Sumter Plywood Corp.,* 535 F. 2d 917 (5th Cir. 1976), *cert. denied,* 429 U. S. 1029, 97 S. Ct. 1105, 51 L. Ed 2d 538 (1977); *NLRB* v. *Sauk Valley Manufacturing Co.,* 486 F. 2d 1127 (9th Cir. 1973), or involved a subject about which the employees had independent knowledge, *see Harlan # 4 Coal Co.* v. *NLRB,* 490 F. 2d 117 (6th Cir.), *cert. denied,* 416 U. S. 986, 94 S. Ct. 2390, 40 L. Ed. 2d 763 (1974). In some the company had had more than ample time to respond. *See NLRB* v. *Sumter Plywood Corp.,* 535 F. 2d 917 (5th Cir. 1976), *cert. denied,* 429 U. S. 1092, 97 S. Ct. 1105, 51 L. Ed. 2d 538 (1977); *Warner Press, Inc.* v. *NLRB,* 525 F. 2d 190 (7th Cir. 1975), *cert. denied,* 424 U. S. 943, 96 S. Ct. 1410, 47 L. Ed. 2d 348 (1976). Not surprisingly, in all of the cases cited above save one the election results were not close, and in that one, *Warner Press, Inc.* v. *NLRB, supra,* the balloting results are simply not reported.

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[12]The final tally was 32 to 29. Challenges to two ballots by the Union were not resolved and the ballots not counted because the votes were not determinative of the election.

We hold that in the present case the misrepresentation contained in the Union handbill, offered without time for rebuttal, with a demonstrated impact on so close an election, requires that the election be set aside. The election lacked "the safeguards necessary 'to insure the fair and free choice of bargaining representatives.'" *Aircraft Radio Corp.* v. *NLRB*, 519 F. 2d 590, 594 (3d Cir. 1975).

Because we have concluded on the record before us that the misrepresentation had a material impact on the election, our proper course is simply to set aside the election rather than remand for further proceedings, as the concurring and dissenting opinion proposes. Courts have not hesitated to order a new election in the face of pre-election misconduct when, as in the present case, the facts underlying the incidents are undisputed and the court has concluded that the activity in question is impermissible. *See NLRB* v. *Carroll Contracting & Ready-Mix, Inc.*, 636 F. 2d 111 (5th Cir. 1981) (per curiam). This willingness to order a new election rather than remand to the Board for further proceedings is exemplified by *Monmouth Medical Center* v. *NLRB*, 604 F. 2d 820 (3d Cir. 1979), where we reviewed misleading campaign literature, concluded that it constituted "impermissible interference in the election," *id.* at 829, and denied the Board's petition for enforcement of its bargaining order without remanding the case for a hearing. *Id.* at 830. *Accord NLRB* v. *Nixon Gear, Inc.*, 649 F. 2d 906 (2d Cir. 1981).

Although this court has sometimes remanded cases involving objections based on pre-election misconduct, in almost every instance the remand was necessitated by the insufficiency of the record. Thus in *Wells Fargo Guard Services* v. *NLRB*, 659 F. 2d 363 (3d Cir. 1981), where the existence of the misrepresentation turned on whether or not the union's president, Martin, had remained in control of the union, we remanded to determine whether his pur-

ported resignation was a sham. As we noted, "[i]f Mr. Martin in fact continued to guide the [union], his purported resignation was a misrepresentation, a substantial departure from the truth, and might well have had a significant impact on the election, which was close." *Id.* at 373. We did not remand for the purpose of determining the materiality and impact of the alleged misrepresentation, but instead concluded based on the record before us that "if Mr. Martin in fact remained in control of the [union] after his purported departure, the . . . election should be set aside." *Id. See also Season-All Industries, Inc.* v. *NLRB*, 654 F. 2d 932 (3d Cir. 1981) (remand to determine whether person was union agent and nature of activity he engaged in); *Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d 292 (3d Cir. 1981) (same). In other cases, remand has been necessary because the nature of the misleading statements made it unclear whether they had affected the election. Thus in *Vitek Electronics, Inc.* v. *NLRB*, 653 F. 2d 785 (3d Cir. 1981), we remanded to the Board because the alleged misrepresentations were ambiguous and may not have been misunderstood by employees. And in *NLRB* v. *Silverman's Men's Wear, Inc.*, 656 F. 2d 53 (3d Cir. 1981), where the pre-election conduct involved not a misrepresentation but a religious slur, we remanded so that it could be established whether the slur created an atmosphere that would have inhibited voting free from the pernicious effect of appeals to prejudice, a question that could not be answered on the record before us.

In the present case we have concluded that the handbill's message was clear, inaccurate, and addressed a question of substantial importance to employees considering whether they wanted to be represented by the Union. In addition, the Union's victory was very narrow. Remand at this stage is therefore neither necessary nor appropriate.

IV.

Because we hold that a new election must be held, we need not address each of Jamesway's remaining objections to the conduct of the election.[13] Nor must we consider the Union's petition to modify the Board's order. Accordingly, Jamesway's petition for review will be granted. The Board's cross-application for enforcement of its order will be denied.

SLOVITER, Circuit Judge. concurring in part and dissenting in part.

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[13]We are troubled, however, by an incident that Jamesway contends marred the actual balloting, involving alleged electioneering by a Union supporter near the polls. Prior to the commencement of balloting, several pro-Union employees wearing Union campaign buttons gathered at the Store's "cutting table," located approximately 15-20 feet from the polls along the main aisle of the Store, so that employees had to pass them on their way to vote. Jamesway requested that the area near the polls remain clear. Nonetheless, the Union's business agent proceeded to station Mary Straus, a member of the Union organizing committee and apparently the chief employee organizer of the Union, at the cutting table, where she remained throughout the balloting. Straus, who was wearing a mass of union buttons, was observed talking about the election and the Union at various times throughout the polling period.

Once Straus was stationed by the polls, her presence may well have been sufficiently intrusive to warrant setting aside the election. She was observed speaking with employees in so loud a tone of voice that she could be overheard by employees casting their ballots. Indeed, several employees complained to the Store's manager about her presence. Emblazoned with campaign buttons, Straus was purposely stationed within the line of march to the polls and reinforced the effect of her presence by a continuous stream of chatter with the employees awaiting their turn to vote. The aggregate effect of so intrusive a presence might require setting aside an election in favor of the offending party. *See Michem, Inc.*, 170 N.L.R.B. 362 (1968).

I concur with the majority in denying enforcement of the Board's order. I disagree with the standard of review adopted by the majority and with the majority's decision to set aside the election rather than to remand for an evidentiary hearing as to the materiality and impact of the misrepresentation.

1. *Standard of Review*

The majority distinguishes between the "substantial evidence" standard and the more deferential "abuse of discretion" standard used by the courts of appeals in reviewing Board decisions, and decides that the less deferential "substantial evidence" standard is applicable in this case.

The wide discretion accorded to the Board in election matters has its genesis in *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330, 67 S.Ct. 324, 327, 91 L.Ed. 322 (1946), where the Supreme Court said, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." The majority appears to concede that *A. J. Tower Co.* requires that an abuse of discretion standard be utilized when the court is reviewing election procedures established by the Board, but it draws a distinction between review of "election procedures and policies established by the Board" and review of determinations regarding the "application of those procedures and policies to specific elections." Typescript op. at 67. Although the majority is correct that the issue in the *A. J. Tower Co.* case involved Board-established election procedures, there is no suggestion in that opinion that the wide discretion enjoyed by the Board should be limited to that aspect of its election-supervising role, nor have the subsequent cases citing *A. J. Tower Co.* made the distinction adopted by the majority in this case.

The majority suggests that, in reviewing the Board's application of its procedures and policies to charges of election misconduct in a particular case, courts "have made reference to the *A. J. Tower Co.* standard even as they have applied the substantial evidence standard." Typescript op. at 67. However, the cases relied on for that proposition do not in fact support it. On the contrary, the three cases cited by the majority stand at most for the proposition that instead of applying either the "abuse of discretion" or the "substantial evidence" standard, there has been a regrettable amalgamation of the two. Thus, in *NLRB v. El-Ge Potato Chip Co.*, 427 F.2d 903, 906 (3d Cir. 1970), *cert. denied*, 401 U.S. 909, 91 S.Ct. 869, 27 L.Ed.2d 807 (1971) (citations omitted), we stated:

> It was long ago settled that the Board is entrusted with a "wide degree of discretion" in establishing and enforcing the procedure and safeguards necessary to insure the fair and free choice by employees of their bargaining representatives. "Considerable weight * * * must therefore be accorded the Board's findings, with judicial review narrowly limited to ascertaining only their reasonableness." Whether this court would reach the same conclusion from the evidence as did the Board is immaterial, as long as the Board's finding that the election was fairly conducted is supported by substantial evidence in the record considered as a whole.
>
> After reviewing the entire record, we cannot say that the Board acted unreasonably in concluding that the election was fair and proper.

Similarly, in *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26 (5th Cir. 1969), the court referred on numerous occasions to the "wide degree of discretion" which must be accorded to the Board's determination:

> We must resolve whether the Board, by overruling the Company's objections to the representation election without a hearing, acted within its wide degree of discretion .... [*Id.* at 28].
>
> * * * * * * *
>
> Certain well established principles guide this inquiry. Most important is the wide discretion Congress has entrusted to the Board in its conduct and supervision of elections .... "Thus, the only question presented to the Courts in an election review is whether the Board has reasonably exercised its discretion." [*Id.* at 29 (citation omitted)]
>
> * * * * * * *
>
> [N]o area is more within the expertise of the Board than the proper limits of campaign propaganda and the impact of employer and union statements upon the employees' exercise of free choice. [*Id.* at 30].

The court also, without any suggestion of inconsistency, said:

> Whether this Court would reach the same conclusion as the Board from the conflicting evidence is immaterial, so long as the Board's finding that the election was fairly conducted is supported by substantial evidence in the record considered as a whole. [*Id.* at 29].

The third case cited by the majority, *NLRB v. Pinkerton's, Inc.*, 621 F. 2d 1322 (6th Cir. 1980), also failed to observe the distinction between the two standards. The court stated:

> Congress has entrusted to the Board considerable discretion in conducting elections and resolving disputes concerning representation. The task for this Court is to determine whether the Board acted arbitrarily in the

> excercise of its discretion. The Board's findings, if supported by substantial evidence, must be affirmed even though this Court might justifiably reach a different conclusion had it reviewed the case de novo.

Id. at 1324 (citations omitted).

Contrary to the majority's suggestion that the courts have applied the substantial evidence standard as distinct from the abuse of discretion standard in reviewing Board determinations as to the effect of election conduct, the cases cited by the majority, which involved charges of particular election misconduct not the formulation of general procedures and policies, emphasized the wide discretion enjoyed by the Board in election matters. At most, these cases indicate that the courts often seem to use "abuse of discretion" and "substantial evidence" interchangeably.

It may be that given this state of affairs, we are free to decide the issue *de novo*. We are, however, bound to follow the precedent of this court. Although, as *El-Ge Potato Chip* indicates, we have not always been meticulous in observing the distinction between the two standards, our recent cases suggest that we have most frequently, although not invariably, applied the abuse of discretion standard to the election conduct issue before us. In *Monmouth Medical Center* v. *NLRB*, 604 F.2d 820 (3d Cir. 1979), we employed an abuse of discretion/arbitrariness standard in a case involving charges of Union misconduct. Although we refused to enforce the Board's order that the Company bargain with the Union, we did so on the ground that "the Board's certification decision ... amounted to an abuse of discretion." *Id.* at 821. *See also id.* at 823, 825. In *NLRB v. Campbell Products Department*, 623 F.2d 876, 879 (3d Cir. 1980), we noted that "[t]he Board has wide discretion in evaluating the circumstances surrounding an election and determining whether these circumstances allowed a free and fair choice by the

voters." *See Anchor Inns, Inc. v. NLRB*, 644 F.2d 292, 295-96 (3d Cir. 1981); *Wells Fargo Guard Services v. NLRB*, 659 F. 2d 363, 370 (3d Cir. 1981). *But see Zeiglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1002, 1005 (3d Cir. 1981).

The approach in these cases accords with that generally followed elsewhere. For example, in *Melrose-Wakefield Hospital Association, Inc. v. NLRB*, 615 F.2d 563, 566-67 (1st Cir. 180), the court stated:

> In seeking to overturn the Board's decision overruling the objections, the Hospital faces a heavy burden. The Board has wide discretion in setting standards for the conduct of representation elections, *and its rulings on the effect of a particular campaign practice will be set aside only if they are an abuse of discretion.*
> . . . .
>
> The Board has adhered to different standards over the years for evaluating what range of misstatements will so mar an election that its results must be set aside . . . . *Our task as a reviewing court is not to evaluate the merit of the Board's policy, the development of which is committed to their expertise, but merely to ascertain whether the agency abused its discretion in applying the standard to particular facts.*

(emphasis added) (citations & footnote omitted). As Professor Gorman has written, "In the great majority of cases, the decision of representation issues will invite the exercise of considerable discretion in the application of vague (or nonexistent) statutory mandates to highly particularized facts." R. Gorman, *Labor Law* 60 (1976). Professor Gorman included among the categories of issues to which this standard has been applied both "the upsetting of 'laboratory conditions' which are prerequisite to a valid election" and "the propriety of conduct at election locations." *Id.*

The majority confuses the review of findings as to the occurrence of an unfair labor practice, which are subject to the substantial evidence standard, with the question of the impact of election misconduct. Typescript op. at 67-68 n.5. As our decision in *Monmouth Medical Center* illustrates, we have accorded the Board greater deference in the latter area.

The most careful, and for me the correct, allocation between the issues governed by the "wide discretion" and "substantial evidence" standards was made by Judge Pell. In *Peerless of America, Inc. v. NLRB*, 576 F.2d 119, 122 (7th Cir. 1978) (citations omitted), he wrote, "We note that the Board has been entrusted with broad discretion in determining the nature and extent of pre-election campaign propaganda that will be allowed, and thus considerable deference must be given to the Board's expertise in this area. We will not upset the Board's decision unless we find that it abused its discretion; however, the Board's findings of fact are conclusive if supported by substantial evidence."

There are indeed practical reasons for according wide deference to the Board's election decisions, even when the issue is election misconduct. As the court stated in *NLRB v. Nixon Gear, Inc.*, 649 F.2d 906, 910 (2d Cir. 1981) (citations omitted), a case raising the issue of election misconduct: " 'The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse,' lest appellate interference threaten the essential functioning of a system that governs, according to well-settled standards, the conduct of nearly 10,000 elections annually."

I believe the attempt by the majority to clarify the confusion which has surrounded the applicable standard of review in election cases is commendable; I believe its selection of the applicable standard in this case is erroneous.

2. *Necessity of a Hearing*

I agree with the majority that distribution of the handbill under the circumstances in this case could constitute a misrepresentation, notwithstanding the literal truth of the statement. I believe, however, that the appropriate course would be to remand to the Board for an evidentiary hearing as to the materiality and impact of the misrepresentation.

As the majority notes, an election will not be set aside unless the misrepresentation related to a material fact and had a significant impact. In this case, there has been no hearing on either the materiality or the impact of the misrepresentation. The issue was not addressed by the Regional Director because of his erroneous view that the statements were shielded by their literal truth. When the issue was presented to the Board in the context of the unfair labor practice charge, it refused to hold a hearing. Thus, those on whom we would ordinarily rely to make the relevant factual findings have not done so.

There are cases in which the courts have held it appropriate to set aside an election although no hearing was held. *See, e.g., NLRB v. Nixon Gear, Inc.*, 649 F.2d 906 (2d Cir. 1981) (company argued it had been prejudiced by the delay); *NLRB v. Carroll Contracting & Ready-Mix, Inc.*, 636 F.2d 111 (5th Cir. 1981). *See also Monmouth Medical Center v. NLRB*, 604 F.2d 820 (3d Cir. 1979) (election set aside without discussion of whether hearing should be ordered or whether a hearing had been requested). However, in most of the recent cases in which this court has denied enforcement in unfair labor practice proceedings involving underlying election challenges, we have remanded for a hearing. *See, e.g., Wells Fargo Guard Services* v. *NLRB*, 659 F. 2d 363 (3d Cir. 1981); *Season-All Industries, Inc.* v. *NLRB*, 654 F. 2d 932 (3d Cir. 1981); *Vitek Electronics, Inc.* v. *NLRB*, 653 F. 2d 785 (3d Cir. 1981); *Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d 292 (3d Cir. 1981).

The clearest rationale for remanding to the Board for a hearing in this case appears in *NLRB v. Silverman's Men's Wear,* 656 F.2d 53 (3d Cir. 1981) (per curiam), in which both judges constituting the majority here were also on the panel. In that case, the Company alleged that a union official had made an anti-Semitic slur against a company official. The court concluded as a matter of law that the remark was illegitimate, but remanded for a heraing to "determine the extent of its probable impact on the election." *Id.* at 58. The court stated:

> We conclude that under the law announced in *Sewell* [*Manufacturing Co.*, 138 N.L.R.B. 66 (1962)], the Company's allegations, if true, would warrant a new election, assuming that the totality of circumstances surrounding Baird's remarks evinced an atmosphere in which those remarks may reasonably be expected to have had a significant impact on the employees' free exercise of choice. These factors should properly be explored at a hearing, because they constitute substantial and material factual issues necessarily arising out of the allegations made in the Company's objection. *See Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d at 296. Having received the Company's allegations, it was only through a hearing that the Regional Director could determine that such circumstances were *not* present, for only through a hearing could the union have borne its burden of proving that the utterance was harmless. Such a course—followed already by at least some Regional Directors—is necessary if elections are to be kept free, as they should be, from appeals to racial or religious prejudice.

Id. at 60. The election misconduct in *Silverman's* would appear to be more patently improper than that involved here. I believe, therefore, that we should follow the course

utilized there, and remand for a hearing to give the Union the opportunity to show that the misrepresentation in this case did not have the forbidden impact.[1]

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[1]The majority has chosen not to address the issue of the appropriateness of the unit determination. The Company challenges the inclusion of the head cashier and two students in the unit. *See* typescript op. at 65 n.3. The inclusion of the students will probably not recur. However, since the majority orders a new election, I assume it approves the determination that the head cashier was appropriately placed in the unit, a determination which I believe is supported by the record in this case.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 77-1567.

KUSTOM ELECTRONICS, INC., - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

Argued November 7, 1978.
Decided December 22, 1978.

On petition by company to review order of National Labor Relations Board that company proceed to bargain with union representing employees and cross petition for enforcement, the Court of Appeals, William E. Doyle, Circuit Judge, held that: (1) evidence was sufficient to support conclusion that employees laid off by company had reasonable expectation of reemployment at time of representation election, and thus were entitled to vote in such election; (2) dismissal of union's charge of unfair labor practice growing out of layoff of employees was not legally inconsistent with Board's position that there was reasonable expectation by employees of recall; (3) company failed to prove substantiality of claims of misrepresentation and unfair campaign propaganda by union in connection with representation election; (4) company's objections to manner of handling election considered as whole did not carry sufficient impact to justify invalidating representation election, and (5) ruling that company engaged in unfair labor practice by refusing to bargain with union was not abuse of discretion.

Orders enforced.

1. Labor Relations Key 681

On review of order of National Labor Relations Board, Court of Appeals is unable to reevaluate evidence where conflict existed and Board has chosen version of evidence which is adequately supported by the evidence.

2. Labor Relations Key 212

Proper test for determining whether laid off employees had right to vote in representation election is whether employees who had been laid off had at time of election reasonable expectation of reemployment within reasonable time in the future.

3. Labor Relations Key 212

Rationale for rule that laid off employee who has reasonable expectation of reemployment is entitled to vote in representation election is that such employee has bona fide interest in conditions which will obtain when he returns.

4. Labor Relations Key 214

Evidence in proceeding before National Labor Relations Board was sufficient to support conclusion that employees laid off by company had reasonable expectation at time of representation election that they would be reemployed, and thus would be eligible to vote in such election.

5. Labor Relations Key 212

It is conditions at time of election which determines whether laid off employees had reasonable expectation of reemployment in order to be eligible to vote in representation election, and thus fact that employees were given to understand at time of layoff that layoff was permanent was not conclusive.

6. Labor Relations Key 599

Ruling by general counsel of National Labor Relations Board that layoff of company employees was not illegal did

not ipso facto establish that employees could not anticipate reasonably that they would be recalled, and thus dismissal of charge of unfair labor practice growing out of layoff was not legally inconsistent with Board's position that there was reasonable expectation of recall for purposes of entitling layoff employees to vote in representation election.

7. Labor Relations Key 210

National Labor Relations Board had measure of discretion in manner in which it conducted election on certification of union as collective bargaining representative.

8. Labor Relations Key 214

In proceeding before National Labor Relations Board, company failed to prove substantiality of claims and objections concerning misrepresentations and unfair campaign propaganda by union in connection with representation election.

9. Labor Relations Key 214

Company's objections to manner of handling of election to certify collective bargaining representative considered as whole did not carry sufficient impact to justify invalidating such election.

10. Labor Relations Key 574

Finding by National Labor Relations Board that company engaged in unfair labor practice by refusing to bargain with union which had been designated by majority of employees of company as their representative for purposes of collective bargaining was not abuse of discretion. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

Earl J. Engle of Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Mo. (John M. Edgar of Stinson, Mag, Thomson, McEvers & Fizzell, Kansas City, Mo., on the brief), for petitioner.

Eric G. Moskowitz, N.L.R.B., Washington, D.C. (John S. Irving, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Carl L. Taylor, Associate Gen. Counsel, and Elliott Moore, Deputy Associate Gen. Counsel, Washington, D.C., on the brief), for respondent.

Before HOLLOWAY, DOYLE and LOGAN, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

This is a review of an order of the National Labor Relations Board, which order was issued against the petitioner on July 21, 1977. Kustom Electronics, Inc. has filed a petition pursuant to § 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* Kustom seeks a judgment setting aside the order of the NLRB. The Board has cross-applied for enforcement of its order. The alleged unfair labor practices occurred in Chanute, Kansas, where Kustom manufactures sound amplifiers, police radar and digital communications equipment.

The finding of the Board was that the Company had violated § 8(a)(5) and (1) of the Act by its refusal to bargain with the Communications Workers of America, AFL-CIO, which the Board had certified as the exclusive bargaining representative of the Company's employees following the representation proceeding.

The activities leading to the hearing before the Board go back to December 9, 1974, at which time the Union filed a representation petition. Following this, a hearing was held on January 23, 1975, for the purpose of determining the appropriate unit for collective bargaining. One of the issues at the hearing was whether a group of employees who had been laid off by the Company on December 18 and December 20, 1974, were eligible to vote in the upcom-

ing election. The decision of the Regional Director of the NLRB was that there be an election in a unit of production and maintenance employees of Kustom Electronics, Inc., which included the music, data communications and radar divisions. The Regional Director ruled that the employees laid off in December 1974 would not be eligible to vote in that election. The Union sought review by the Board of the ruling excluding the employees who had been laid off.

An unfair labor practice charge had been filed with the Board in which it was alleged that the Company's layoff was discriminatory and unlawful. The Regional Director dismissed the charged allegations, and the Union filed an appeal with the General Counsel. So the layoff matters were considered by the Board simultaneously with consideration by the General Counsel of the dismissal of the unlawful labor practices.

The Board issued an order directing that the laid off employees be permitted to vote. This was on May 22, 1975. On May 28, the General Counsel remanded the unfair labor practice proceeding to the Region for further investigation.

At the election, which was held on June 18, 75 votes were cast for representation by the Union; 68 were against. Forty-six of the ballots were challenged. These numbers were later changed following a hearing before Administrative Judge Nixon. The Union continued to prevail 103 to 79.

The Company filed objections to the conduct of the Union in connection with the election, alleging that the Union interfered with the election by (1) misrepresenting that the Company had violated the Act by laying off employees in December 1974, and by failing to give employees wage increases in April 1975, as it had in previous years; (2) misrepresenting that other employees under Union contract had recently received large wage increases; (3) by unfairly employing Board rulings as campaign propa-

ganda; (4) by offering employees financial inducements for their Union support; and (5) by threatening employees with reprisals for failure to support the Union. The Company also objected to the Board's having remanded the unfair labor practice matter to the Region and to its having granted the laid off employees permission to vote, as well as the Board's permitting the same Board agent to both investigate the Union's unfair labor practice charges and to conduct the representation election.

In December 1975 and February 1976, hearings were held looking to determination by the Board of the Challenges and objections of the Company. On May 24, 1976, the Hearing Officer issued his report and recommendations on the challenges and objections. He recommended that the objections be overruled in their entirety, that the challenges to eight ballots be sustained, that the other 39 challenges be overruled, and that the ballots be counted. The Company filed objections to the Hearing Officer's report. However, the Board on October 15, 1976, issued its decision which affirmed the Hearing Officer's rulings, findings and recommendations. The Board also ordered the Regional Director of Region 17 to open and count the challenged ballots overruled by the Hearing Officer and to issue a revised tally of ballots and an appropriate certification. It was this recount which showed the revised tally, which is mentioned above, namely 103 votes for representation by the Union, and 79 votes against representation. On October 29, 1976, the Union was certified as the exclusive bargaining representative of the Company's employees.

Thereafter, the Union made requests for information that it regarded as necessary to commence bargaining. By a letter of November 19, the Union advised petitioner, according to the Board's Order, that it was ready to commence bargaining and set a proposed date and place for a meeting. However, petitioner, by letter of November

24, refused to bargain with the Union on the grounds that it did not represent an "uncoerced majority of the Company's employees in any unit appropriate for collective bargaining." The further reason was that the Union was improperly certified. The Union then filed an unfair labor practice charge based upon this refusal to bargain.

As a result of the Company's rejecting the Union's request to bargain, the Union filed an unfair labor practice charge on December 2, 1976. The Regional Director issued a complaint. In its answer the Company admitted a refusal to bargain and also denied the request of the Union for certain information relative to the collective bargaining issue. The Company stood on its position that the certification was invalid. Following the Company's action standing on its position of refusing to bargain, the General Counsel filed a motion with the Board for summary judgment based on the proposition that there were no issues of fact which warranted a hearing. The proceeding was then transferred to a panel of three Board members together with a notice to show cause why the motion for summary judgment should not be granted. The Company again stated its position challenging the validity of the election and the validity of the certification.

The General Counsel's complaint alleged that Kustom had engaged in unfair labor practices in violation of § 8(a)(5) and (1) and § 2(6) and (7) of the Act.

The complaint alleged in substance that on October 29, 1976, following a Board election, the Union was duly certified as the exclusive bargaining representative of Kustom employees in the appropriate unit, but that the petitioner Kustom had refused and continued to refuse to bargain collectively and to furnish certain information, notwithstanding a request by the Union. Petitioner filed an answer to the complaint admitting part of it and denying part of it.

As an affirmative defense, petitioner alleged that the Board's certification of the Union was invalid for the reason that it was based on a revised tally of ballots including the ballots of persons not entitled to vote because their employment had been terminated on December 20, 1974, six months prior to the election. A further defense was that about 62 percent of the employees in the unit had been hired since the election so that the majority status is now in question; that, therefore, the petitioner "has no duty to bargain with the Union."

The Board entered the opinion that is here at issue. The Board noted that the petitioner argued that the laid off employees, found to have a reasonable expectancy of recall by the Board, were ineligible to vote because the layoff was in fact permanent. This position of petitioner was rejected by the Board because of its previous adoption of the Hearing Officer's report to the contrary. The opinion of the Board points out that the test for determining expectancy of recall is the situation as it existed at the time of the election rather than subsequent developments.

The opinion pointed out that in the absence of newly discovered evidence or previously unavailable evidence or special circumstances, a respondent in the proceeding alleging a violation of § 8(a)(5) may not relitigate issues which were or could have been litigated in a prior representation proceeding.

Further, no merit was determined to exist as to the petitioner's contention that because 62 percent of its work force was newly hired there existed reasonable grounds to doubt the Union's majority status, for the reason that the obligation to bargain extends one year from the date of the certification and employee turnover does not constitute unusual circumstances within the meaning of *Brooks* v. *NLRB*, 348 U. S. 96, 75 S. Ct. 176, 99 L. Ed. 125 (1954). It therefore denied a hearing on employee turnover and

rejected petitioner's contention that it could lawfully refuse to bargain on the basis of employee turnover.

The conclusion of the Board was that on June 18, 1975, a majority of the employees of petitioner in a bargaining unit designated the Union as their representative for the purpose of collective bargaining with the petitioner. As a result, the Union was certified as a collective bargaining representative on October 29, 1976. The Union has sought to bargain collectively, but petitioner has refused to do so.

The Board ordered the Company to cease and desist from refusing to bargain collectively, and to cease and desist its refusal to furnish the Union with information relevant and necessary for the collective bargaining, interfering with, restraining, and coercing, employees in the exercise of rights guaranteed them under § 7 of the Act. The Board also ordered that it proceed to bargain with the Union regarding rates of pay, wages, hours and other terms and conditions of employment. The initial period of certification was set on the date petitioner comenced to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.

[1] Numerous points are advanced by the Company in support of its demand that the Board's order finding that the petitioner engaged in unfair labor practice by refusing to bargain with the Union was in error and should be vacated. Many of these points are factual and hence are inappropriate, since we are unable to reevaluate the evidence where, as here, there exists a conflict and the Board has chosen a version of the evidence with which the Company disagrees, but which is adequately supported by evidence.

The underlying question is whether the Board erred in finding and concluding that the employees who were laid off on December 20, 1974, were entitled to vote in the June 18, 1975, election, for if all of these votes were thrown out,

the certification would be invalid as would be the Board's order requiring the Company to bargain collectively.

There are other subsidiary issues, but these appear to be more in the nature of window dressing than contentions capable of causing the proceedings to be set aside. Much complaint is made about the timing of Board rulings in relationship to the election. Also, one threat is emphasized, and it is generally contended that the Union interfered with the election by disseminating slanderous, false and inaccurate information concerning the permanent layoff of employees on December 20, 1974. All of these issues are very carefully held up to the light, so to speak, by the Trial Examiner, who determined that the matters lacked merit.

Our conclusion is that the Trial Examiner and, in turn, the Board were correct and that the Board's Order is entitled to be enforced.

I

[2, 3] The Company admits that the proper test for determining the right to vote under circumstances such as these is whether the employees who had been laid off had at the time of the election a reasonable expectation of reemployment within a reasonable time in the future. The rationale for this is that where a laid off employee has a reasonable expectation that he will be called back when business picks up, he has a bona fide interest in the conditions which will obtain when he returns. *N.L.R.B.* v. *Hondo Drilling Company*, 428 F. 2d 943, 946 (5th Cir. 1970); *N.L.R.B.* v. *Jesse Jones Sausage Co.*, 309 F. 2d 664, 666 (4th Cir. 1962); *Marlin-Rockwell Corp.* v. *N.L.R.B.*, 116 F. 2d 586, 588 (2d Cir.), *cert. denied*, 313 U. S. 594, 61 S. Ct. 1116, 85 L. Ed. 1548 (1941). *See N.L.R.B.* v. *C. H. Sprague & Son Co.*, 428 F. 2d 938, 940 (1st Cir. 1970).

[4, 5] The question whether the employees here had a reasonable expectation at the time of the election that they would be reemployed was one of fact and there was adequate evidence to support the Board's conclusion on this. A number of employees who were laid off were shown to have returned in the spring of 1975. Some of these continue to be challenged by the Company, but there could be no question that they had a reasonable expectation of continued employment. There was also evidence that the Company's policy was to recall laid off employees and then put them to work in other divisions. Furthermore, at the time in question, although the Company's financial condition had been poor it showed promise, which could lead the employees involved to believe that they were likely to be called back. The Company argues that employees were given to understand at the time of the layoff that is was permanent. This is not conclusive because it is the condition at the time of the election that counts. *N.L.R.B.* v. *Jesse Jones Sausage Co., supra,* at 666.

There is one other fact that is worthy of mention and that is that notice to some of the employees was that the layoff would be temporary. Later they were notified that they should consider it to be permanent. Those who were laid off on December 20 did not receive individual notices that it would be permanent. There was a bulletin board letter posted. Also, some of the supervisors advised the employees that it would be permanent, but evidence was unclear whether all of them made the announcement. One employee said that she was told that it was to be temporary.

[6] It cannot be said that the General Counsel's dismissal of the Union's charge of unfair labor practice growing out of the December layoff is legally inconsistent with the Board's position that there was a reasonable expectation of recall. The ruling that the December layoff was not

illegal did not *ipso facto* establish that the employees could not anticipate reasonably that they would be recalled in the face of the various evidence as to the Company's policy to recall people laid off as opposed to hiring new people. The efforts of the Company therefore to elevate this issue to one of law rather than fact cannot be accepted. The issue was one of fact which was tried and resolved against the Company.

II.

[7] The election was, of course, under the supervision of the Board and it had a measure of discretion in the manner in which it conducted the election. There has been no showing that there was an abuse of discretion in this respect. One objection was that the Union misrepresented that the Company had violated the Act (NLRA) by laying off a number of employees. The Hearing Officer considered all of these objections and recommended that they be overruled. It is said that there was misrepresentation as to the Company violating the Act by laying off the employees, failing to give employees wage rate increases given in prior years and unfairly employing Board rulings as campaign propaganda, and making threats of reprisals for failure to support the Union.

[8] It does not appear that the Company has satisfied its burden of proof as to the substantiality of these claims and objections. The one threat that was made was not related in time to the election and was not a direct threat. As to the misrepresentations and unfair campaign propaganda, a good deal of it would appear to be rhetoric and basically insubstantial. In any event, we cannot say that it is of such magnitude that this court can regard it and weigh it so as to upset the judgment of the Board.

The threat to the employee, one Ruth Daniel, was during a discussion Ms. Daniel had with Terry Hague and two other employees regarding the Union. She remarked that she would not be affected by any strike since she could cross the picket line and go to work. Hague responded, "No you would not because you would be stopped." She asked him what he meant and he said, "Your head would be bashed in if nothing else." This statement by Hague was his own remark and was in the course of a conversation, and the Board was free to decide that Daniel was not coerced by the statement.

III.

[9] Complaint is made about the Union compensating witnesses who appeared at the representation hearing for their loss of time. It is said that the payments were unlawful. The Board did not consider these payments to be anything more than remuneration for loss of time and hence they did not invalidate the election. The same was true of workers who were compensated on an hourly basis for time spent in aiding the Union in its campaign. Sometimes the payments exceeded somewhat the payments they received from the Company. The Board did not believe that the payments were of such a nature that they in themselves established that the employees were influenced because of it.

We consider the contention that the Board erred in not sustaining the Company's objections to the manner of handling the election, and it does not appear that there was any substantial impropriety in this area. It is also argued by the Company that the cumulative effect of all of their objections should constitute a basis for invalidating the election (even though no single one of the objections is sufficient). It does not appear that the Company's objections considered as a whole carry sufficient

impact to justify the appellate court's ruling that the election was invalid.

[10] Our conclusion is, from a study of the contentions and consideration of the evidence which was presented, that the issues generally are factual in nature, and it does not appear that there was an abuse of discretion by the Board in its ruling.

Accordingly, there being nothing that has been called to our attention to justify setting aside the Findings, Conclusions and Orders of the Board, it is ordered that the ruling of the Board be approved and that its Orders be enforced.

UNITED STATES COURT OF APPEALS

FIRST CIRCUIT

No. 79-1324.

MELROSE-WAKEFIELD HOSPITAL ASSOCIATION, INC. - - - - - - - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD - - *Respondent.*

Argued December 4, 1979.
Decided February 21, 1980.

On petition for review of an order of the National Labor Relations Board, the Court of Appeals, Coffin, Chief Judge, held that: (1) while hospital alleged that union leaflet, which contrasted the employees' ability to vote out corrupt union officials with their inability to rid themselves of "corrupt or irresponsible hospital management," falsely cast it as a "lawbreaker," the statement, which essentially praised the safeguards of union democratic procedures rather than attacked management, was well within the permissible give and take of campaign propaganda; (2) while union's claim, in a letter distributed prior to election, that it had never "fired, tried, or punished a member for crossing a picket line" was equivocal, it was not such a "gross misrepresentation" as to transcend acceptable campaign overstatement and to become a ground for invalidating the election; and (3) while hospital alleged that Union's statements distorted NLRB processes by intimating that the NLRB had found the hospital guilty of "lawbreaking," when, in fact, the

NLRB had only filed an unfair labor practice complaint against the hospital and scheduled a hearing, the regional director did not abuse his discretion in ruling that the subject leaflet, taken in its entirety, did not substantially mischaracterize the status of the NLRB action.

Order enforced.

1. Labor Relations Key 214

Under NLRB-mandated procedure, the regional director, upon receipt of a complaint about the conduct of an election, pursues an investigation, assesses the validity of the objections, and orders a hearing if the objecting party has raised "substantial and material factual issues." App. 29 U.S.C.A. Rules & Regulations, § 102.69(c).

2. Labor Relations Key 675

In seeking to overturn NLRB's decision overruling hospital's objections to union's campaign practices, hospital faced a heavy burden.

3. Labor Relations Key 210, 215

NLRB has wide discretion in setting standards for the conduct of representation elections, and its rulings on the effect of a particular campaign practice will be set aside only if they are an abuse of discretion.

4. Labor Relations Key 215

NLRB will set aside an election only when there is (1) a substantial misrepresentation of a material fact, (2) made by one with special knowledge of true facts, (3) communicated so shortly before the election that the other party has no opportunity to correct it, and (4) involving facts about which the employees are not in a position to know the truth.

5. Labor Relations Key 211

Only a narrow range of campaign propaganda and misrepresentations require NLRB intervention; most exaggerations and misstatements are left to be countered or corrected in the give and take of a robust campaign.

6. Labor Relations Key 211

NLRB confines its sanction to those statements during an election campaign that appear to have unfairly affected the outcome of the election, since demanding a greater purity of campaign declamation would be unrealistic and perhaps paternalistic, and since a more searching official scrutiny of campaign conduct would afford losing parties too ample an opportunity to gain delay by litigating objections.

7. Labor Relations Key 211

While hospital alleged that union leaflet, which contrasted the employees' ability to vote out corrupt union officials with their inability to rid themselves of "corrupt or irresponsible hospital management," falsely cast it as a "lawbreaker," the statement, which essentially praised the safeguards of union democratic procedures rather than attacked management, was well within the permissible give and take of campaign propaganda.

8. Labor Relations Key 211

Nonauthoritative statements made to employees in three telephone calls several weeks before unionization election, two of which calls came from union officials, were permissible, as such statements left the employees free to form their own evaluation.

9. Labor Relations Key 215

Telephone call to a hospital employee by an unknown person who claimed that the hospital president had been

indicted for medicare fraud and that management had improperly juggled hospital funds did not require that unionization election be set aside, as there was no showing that this single telephone message imbued the election atmosphere with fear.

10. Labor Relations Key 215

Nonparty statements require the setting aside of a unionization election only when they are shown to have created such an atmosphere of fear and coercion that free choice has become impossible.

11. Labor Relations Key 211

While union's claim, in a letter distributed prior to election, that it had never "fired, tried, or punished a member for crossing a picket line" was equivocal, it was not such a "gross misrepresentation" as to transcend acceptable campaign overstatement and to become a ground for invalidating the election.

12. Labor Relations Key 211

NLRB deals severely with statements that entangle it and its processes in campaign wrangling because of its concern that its integrity or neutrality may be compromised in the eyes of voters.

13. Labor Relations Key 210

While hospital alleged that union's statements distorted NLRB processes by intimating that the NLRB had found the hospital guilty of "lawbreaking," when, in fact, the NLRB had only filed an unfair labor practice complaint against the hospital and scheduled a hearing, the regional director did not abuse its discretion in ruling that the subject leaflet, taken in its entirety, did not substantially mischaracterize the status of the NLRB action.

14. Labor Relations Key 211

Union polling of employees is not objectional in and of itself.

15. Labor Relations Key 215

Two instances of minor but offensive defacement of witnesses' automobiles and an additional threat of damage did not warrant setting aside unionization election, where the witnesses could not identify who had damaged their cars or made the threats, and where the likelihood of oppressive intimidation was attenuated because the victims of the incidents were not eligible voters.

16. Labor Relations—Key 213

Fact that a union representative watched the employees enter hospital building to vote and had two conversations with employees in a parking lot behind the building, but never entered the polling area and could not see it from his vantage point, would not justify invalidating the unionization election .

17. Labor Relations Key 214

For the NLRB to abuse its discretion by not finding that the totality of a party's conduct, no single component of which is legally objectionable, requires a new unionization election, the complainant, must, at a minimum, offer the NLRB detailed evidence of the pattern the activity formed and its influence on the election.

18. Labor Relations Key 214

A hearing by the NLRB must be held only where substantial, material issues of fact need to be resolved.

19. Labor Relations Key 214

Burden is on the objecting party to proffer specific evidence to contradict the findings of NLRB's regional di-

rector, and this evidence must consist of more than a difference of opinion with the regional director's inferences and conclusions.

20. Labor Relations Key 214

Where the employer only disputes the legal conclusions to be drawn from the fact of the occurrences and the estimation of the impact on the unionization election, such disagreement standing alone does not mandate a hearing.

Richard D. Armstrong, Jr., Boston, Mass., with whom Snyder, Tepper & Berlin, Boston, Mass., was on brief, for petitioner.

Allison Beck, Washington, D. C. with whom Allison W. Brown, Jr., Norton J. Come, Acting Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, and Elliott Moore, Deputy Associate Gen. Counsel, Washington, D. C., were on brief, for respondent.

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

COFFIN, Chief Judge.

A hospital here challenges a decision of the National Labor Relations Board that various pre-election acts and statements of a union attempting to become the collective bargaining representative for technical workers at the hospital did not so poison the atmosphere of the election that it should be set aside. For the reasons discussed herein we affirm the Board's conclusions and enforce its unfair labor practices order against the hospital.

The employer in this case, Melrose-Wakefield Hospital Association, Inc. (Hospital), is a private, non-profit medical care center. The employees in the collective bargaining unit are described as technical employees, a group of 208 workers including licensed practical nurses, some counsellors and a wide range of health care technicians. The union in this case, the Massachusetts Hospital Workers Union, Local 880

(Union), sought and received a Decision and Direction of Election from the Board's Regional Director. The Union won the election, held in September, 1978, by 93 to 76 votes; seven challenged votes were never counted. The Hospital thereafter filed with the Regional Director a long list of objections to the Union's campaign practices.

[1] Under Board-mandated procedure, the Regional Director, upon receipt of complaints about the conduct of an election, pursues an investigation, assesses the validity of the objections and orders a hearing if the objecting party has raised "substantial and material factual issues", 29 C.F.R. § 102.69(c). Here, the Regional Director rejected all the Hospital's objections, found that no hearing was necessary and certified the Union as the exclusive collective bargaining representative of the technical employees. The Board refused to review the Regional Director's decision, finding that the Hospital's appeal raised no substantial issues.

Subsequently, the Hospital refused to bargain with the Union, concededly in order to generate an unfair labor practices order from the Board, which would permit judicial review of the disposition of the Hospital's objections to the Union's capaign practices. This order issued in May, 1979, and the Hospital filed a timely notice of appeal. The Board cross petitioned for enforcement of its order.

[2, 3] In seeking to overturn the Board's decision overruling the objections, the Hospital faces a heavy burden. *Solon Mfg. Co. v. N. L. R. B.*, 544 F.2d 1108, 1111 (1st Cir. 1976). The Board has wide discretion in setting standards for the conduct of representation elections, *N. L. R. B.* v. *A. J. Tower Co.*, 329 U. S. 324, 330, 67 S. Ct. 324, 327, 91 L. Ed. 322 (1946),[1] and its rulings on the effect of a par-

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[1]We reject as frivolous the Hospital's position that the Board's rules on post-election review of campaign objections are arbitrary

(Footnote Continued on Next Page)

ticular campaign practice will be set aside only if they are an abuse of discretion. *N. L. R. B.* v. *Golden Age Beverage Co., Inc.*, 415 F. 2d 26 (5th Cir. 1969); *N. L. R. B.* v. *O. S. Walker Co., Inc.*, 469 F. 2d 813 (1st Cir. 1972). Bearing this in mind we address the Hospital's contentions. Its objections relate to alleged misstatements by the Union and miscellaneous other campaign practices which are said to have impaired the employees' freedom of choice.

Misrepresentations

[4-6] The Board has adhered to different standards over the years for evaluating what range of misstatements will so mar an election that its results must be set aside. However, in *General Knit of California, Inc.*, 239 NLRB No. 101, 1977-78 NLRB Dec. (CCH) ¶ 15,317 (1978), the Board clearly reembraced the once discarded rule of *Holly-*

(Footnote Continued From Preceding Page)

and capricious. When the Regional Director has had to resolve pre-election disputes in a Decision and Direction of Election, objections filed after the election are reviewed by only three members of the Board on a narrow scope of review. We think it a wholly adequate answer to the contention that this procedure is arbitrary to note that Congress in section 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b), authorizes the Board to delegate any or all of its powers to three member panels of Board members and that the Board has "a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *N. L. R. B.* v. *A. G. Tower Co.*, 329 U. S. 324, 330, 67 S. Ct. 324, 328, 91 L. Ed. 322 (1946) (citations omitted). Petitioner here, as elsewhere, overargues its position. It relies on *KFC National Management Corp.* v. *N. L. R. B.*, 497 F. 2d 298 (2d Cir. 1974), but the case is inapposite. There, the court ruled only that Board members themselves, rather than staff assistants, must decide whether to review decisions of Regional Directors. Here, the Board members have made the decision and so complied with the Act.

wood Ceramics Co., Inc., 140 NLRB 221 (1962).[2] Applying this rule, the Board will set aside an election only when there is (1) a substantial misrepresentation of a material fact, (2) made by one with special knowledge of true facts, (3) communicated so shortly before the election that the other party has no opportunity to correct it, and (4) involving facts about which the employees are not in a position to know the truth. *Trustees of Boston University* v. *N.L.R.B.*, 575 F. 2d 301, 308 (1st Cir. 1978); *Peerless of America, Inc.* v. *N.L.R.B.*, 576 F. 2d 119, 123 (7th Cir. 1978). The *Hollywood Ceramics* policy contemplates that only a narrow range of campaign propaganda and misrepresentations require Board intervention; most exaggerations and misstatements are left to be countered or corrected in the give and take of a robust campaign. The Board confines its sanction to those statements that appear to have unfairly affected the outcome of the election for two reasons. First, the Board believes that demanding a greater purity of cam-

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[2]The Board returned to *Hollywood Ceramics* between the time when the Regional Director made his decision and the time of the Board's review. The Regional Director thus applied the more tolerant standards of *Shopping Kart Food Market, Inc.*, 228 NLRB 1131 (1977), then in effect. The Hospital requests that we remand the case so that the Regional Director can conduct a new investigation under the stricter standards of *Hollywood Ceramics*. We decline to do so for two reasons. First, the Regional Director, in a footnote, found that the relevant objections had no merit even under *Hollywood Ceramics*. He explained the defects in those objections under the standard in greater detail than in his application of *Shopping Kart* in the body of the opinion. Second, the Board ruled on the Hospital's appeal applying explicitly *Hollywood Ceramics* and *General Knit*, assuring itself that the Regional Director had considered *Hollywood Ceramics* with full vigor. *Compare N. L. R. B.* v. *Mosey Mfg. Co.*, 595 F. 2d 375, 377-79 (7th Cir. 1979) (case remanded for consideration under *Hollywood Ceramics* rule when that standard was readopted after briefs had been filed in the court of appeals).

paign declamation would be unrealistic and, perhaps, paternalistic. *See General Knit of California, Inc. supra*, 1977-78 NLRB Dec. (CCH) at 28,617-18. Second, a more searching official scrutiny of campaign conduct would afford losing parties too ample an opportunity to gain delay by litigating objections. *See id.* at 28,620. Our task as a reviewing court is not to evaluate the merit of the Board's policy, the development of which is committed to their expertise, but merely to ascertain whether the agency abused its discretion in applying the standard to particular facts.

[7] The first group of alleged misrepresentations consists of "libellous and slanderous misstatements" about Hospital management and their handling of funds. The Hospital points first to a Union leaflet which contrasted the employees' ability to vote out corrupt union officials with their inability to rid themselves of "corrupt or irresponsible hospital management". The petitioner argues that this leaflet falsely cast it as a "lawbreaker". The Regional Director properly overruled this objection because the employer had ample time to respond and because the message essentially praised the safeguards of union democratic procedures rather than attacked management. This statement is well within the permissible give and take of campaign propaganda.

[8] The Hospital further contends that oral denigrations made in three telephone calls several weeks before the election tainted the voting. Two calls came from a Union official. She suggested to employees that the Hospital could manipulate its accounts to mask funds as a strategy in wage negotiations and, also, that the Hospital had given privileges, such as lockers and parking places, to selected employees. The Regional Director overruled objections based on these calls because the caller had disclaimed any special knowledge of the issues, and admitted she had not been to the Hospital recently and was merely giving her opinion. Under *Hollywood Ceramics*, such nonauthoritative state-

ments are seen as leaving the employee free to form his own evaluation and are, therefore, permissible. *See Trustees of Boston University* v. *N. L. R. B., supra*, at 308. *Compare N. L. R. B. v. A. G. Pollard Co.*, 393 F.2d 239, 241-42 (1st Cir. 1968) (apparent special knowledge sufficient because degree of employee reliance determinative).

[9, 10] Another employee was telephoned by an unknown person who claimed that the Hospital president had been indicted for Medicare fraud and that management improperly juggled Hospital funds. The Regional Director discounted the impropriety of the statements because they could not be attributed to the Union. Under settled law, non-party statements require the setting aside of the election only when they are shown to have created such an atmosphere of fear and coercion that free choice has become impossible. *E.g., Manning, Maxwell and Moore, Inc.* v. *N. L. R. B.*, 324 F.2d 857, 858 (5th Cir. 1963). Stricter regulation of non-party statements would punish the prevailing party in the election for events beyond its control, *N. L. R. B. v. Griffith Oldsmobile, Inc.*, 454 F.2d 867, 870 (8th Cir. 1972), and give more importance to such statements than employees are likely to give, *N. L. R. B.* v. *Staub Cleaners, Inc.*, 418 F.2d 1086, 1088 (2d Cir. 1969), *cert. denied*, 397 U. S. 1038, 90 S. Ct. 1357, 25 L. Ed. 2d 649 (1970). Suffice it to say that there was no showing that this single telephone message imbued the election atmosphere with fear.

[11] The Hospital next complains about a letter distributed by the Union, wherein it is claimed that the Union had never "fired, tried, or punished a member for crossing a picket line." (The Hospital obviously takes the view that such a relaxed, not to say lax, view of picket line discipline would appeal to workers.) The Hospital presented to the Regional Director another Union leaflet which had publicly exposed a member for crossing a picket-line; the Hospital alleges that this was severe punishment. The Regional

Director was unimpressed by this objection. He ruled that the Union's boast, while equivocal, was not such a "gross misrepresentation", as to transcend acceptable campaign overstatement and become a ground for invalidating the election. *See Hollywood Ceramics, supra*, at 223-24. We think this judgment was reasonable and within the deference afforded the Board's expertise.

This same observation is applicable to the Hospital's objections to the same letter's railings against the Hospital's campaign tactics and the Union's magnification of the benefits conferred on employees by the collective bargaining process. Employees are fully capable of evaluating such campaign propaganda for what it is worth, *see Solon Mfg. Co. v. N. L. R. B.*, 544 F.2d 1108, 1111 (1st Cir. 1976), and the Regional Director received no evidence indicating that the Hospital could not respond in kind to these statements.

[12] Finally, the Hospital alleges that Union statements distorted Board processes by intimating that the Board had found it guilty of "lawbreaking", when, in fact, the Board had only filed an unfair labor practices complaint against the Hospital and scheduled a hearing. The Board deals severely with statements that entangle it and its processes in campaign wrangling because of its concern that its integrity or neutrality may be compromised in the eyes of voters. *See, e. g., Monmouth Medical Center v. N. L. R. B.*, 604 F. 2d 820, 824 (3d Cir. 1979). For example, the Board ruled in *GAF Corp.*, 234 *NLRB* 182 (1978) that a campaign document that, in part, indicated Board support for the Union required invalidation of the election because it had a "tendency to mislead" employees about the Board's neutrality.

[13] Here, however, the Regional Director ruled that the leaflet taken in its entirety, did not substantially mischaracterize the status of the Board's action. The leaflet is captioned in bold headlines stating: "Hospital *charged*

with breaking the law" (emphasis added). The leaflet also states that the Board's "investigator found that many illegal actions had been committed by the hospital", and that the "NLRB does not issue a complaint unless substantial evidence exists that the hospital has violated the law." The Regional Director decided that the leaflet did not claim that the Hospital had been judged guilty of any violation and that while the reference to the unlawful actions "found" by the investigator was an overstatement, this amounted only to a layman's rendition which was unlikely to substantially mislead voters as to the status of the Board's action.[3]

We think this question is quite close given the Board's extreme aversion to erroneous references to its procedures. However, we believe that the ruling in this case was not an abuse of discretion. The document at issue contains only a technically incorrect description of the weight afforded a complaint, while clearly indicating that the Board had yet to make an ultimate decision. Thus, this case is distinguishable from other Board cases where a Union clearly and erroneously proclaimed that an employer had been found guilty of an unfair labor practice. *Compare Formco, Inc.*, 233 NLRB 5 (1977); *Natter Mfg. Co.*, 210 NLRB 27 (1974); *Dubie Clark Co.*, 209 NLRB 21 (1974). We think that in this indeterminate region where a party has transgressed

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[3]We note that the Board decision relied on by the Regional Director in reaching this conclusion was subsequently overturned as an abuse of discretion. *Monmouth Medical Center* v. *N. L. R. B.*, *supra*. A similar mischaracterization of the significance of the filing of an unfair labor practices charge was at issue in that case. Nonetheless, we think *Monmouth Medical Center* is readily distinguishable from the instant case. There the union repeatedly and erroneously construed Board action in six separate documents and disfigured an official Board pamphlet. In short, the union's impairment of the Board's neutrality was more substantial and pervasive, the challenged statements falling well within the scope of conduct previously condemned by the Board.

a Board policy, but to a less extent than parties sanctioned in earlier Board cases, we should defer to the Board's judgment of the grievousness of the infraction. Thus, the Board and the Regional Director were reasonable in deciding that this Union leaflet did not require a new election.

Other Campaign Practices

[14] The Hospital also presented objections to other miscellaneous Union campaign practices which, it alleges, warrant setting aside the election. First, the Hospital charges that the Union "interrogated" employees on their views and made numerous "harassing" telephone calls to employees' homes. Investigation by the Regional Director revealed six calls to employees, all apparently polite, in two of which the workers were asked how they intended to vote. The Regional Director, noting that Union polling of employees is not objectionable in and of itself, *Springfield Discount, Inc.*, 195 NLRB 921, *enf'd.* 81 LRRM 2173 (7th Cir. November 30, 1972), found that the calls were neither threatening nor coercive and accordingly overruled the objection. We see no reason to disturb this judgment.

[15] The Hospital also alleges that the Union created an environment of fear by damaging property. The evidence came from four witnesses, none of whom were qualified to vote in the representation election, who reported two instances of minor but offensive defacement of their automobiles and an additional threat of damage that never materialized. Significantly, the witnesses could not identify who had damaged the cars or made the threats. Two points support the Regional Director's conclusion that these undesirable events did not warrant setting aside the election. First, as discussed above, acts not attributable to a party require the invalidation of an election only when the acts create such an atmosphere of fear that free voter choice is impossible. Second, the likelihood of oppressive intimidation is attenuated here because the victims of the incidents

were not eligible voters. Thus, this vandalism could have affected the voting only if the voters had been alarmed by news of its occurrence. No evidence was presented to the Regional Director that eligible voters were even aware of these incidents.

The Hospital also cited as objectionable coercion remarks made to a part-time employee, also ineligible to vote in the representation election, by officers of another union to which he belonged in connection with other full-time employment. These encounters, apparently instigated by the Union at the Hospital, involved questioning about the employee's outspoken opposition to the Union at the Hospital. The officials also told the employee that the Union representative at the Hospital had asked them to tell him to "curtail his activities" and that if the employee "didn't like it he should leave." The employee admitted that no retaliation was threatened for his stance at the Hospital. The Regional Director found here no ground for requiring a new election because no threats were made and the part-time worker could not vote. While this behavior by the Union, if our account is accurate,[4] is undesirable, it is nevertheless unclear how it could have affected the voting. The employer had the burden of showing the connection between the behavior and the voting and, no such showing having been made, the Regional Director's conclusion must stand.

[16] The Hospital challenges the Union for engaging in "surveillance" of employees as they arrived at the voting premises. The investigation revealed only a management report that a Union representative had watched the employees enter the hospital building to vote and had two conversations with employees in a parking lot behind the building.

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[4]The Union claimed that it had asked the union officials only to ask the employee if he was opposed to all unions or only the Hospital Union. The Regional Director accepted the employee's version as true for the purpose of making his ruling.

He never entered the polling area nor could he see it from his vantage point. The Regional Director properly concluded that there was nothing in his behavior that would justify invalidating the election. *See N. L. R. B. v. Moyer & Pratt, Inc.*, 208 F.2d 624, 625-26 (2d Cir. 1953); *Harold W. Moore & Sons*, 173 NLRB 1258 (1968).

[17] The Hospital, finally, contends that even if no single instance of conduct or misrepresentation to which it objected warrants setting aside the election, the Board should have concluded that the collective impact of Union behavior destroyed the conditions necessary for free and fair elections. This argument was presented to the Board in only the vaguest terms. We may assume that the Board can conclude upon substantial evidence that a "systematic pattern of activity", involving misrepresentations or coercion, requires invalidation of an election even when no single act so requires. *See N. L. R. B.* v. *Decato Aircraft, Inc.*, 512 F. 2d 758, 761 (9th Cir), *cert. denied*, 423 U. S. 836, 96 S. Ct. 63, 46 L. Ed. 2d 55 (1975). However, for the Board to abuse its discretion by not finding that the totality of a party's conduct, no single component of which is legally objectionable, requires a new election, the complainant must, at a minimum, offer the Board detailed evidence of the pattern the acitivty formed and its influence on the election. The tactic of making multiple inadequate objections to an election and aggregating them in a "totality" argument can rarely succeed absent this detailed evidentiary showing. We are not prepared to assume that puffs of this sort of smoke indicate the existence of any flame. Here, the Hospital offered the Board only conclusory assertions and the Board had no obligation to take the allegation seriously.[7]

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[7]The Hospital raises for the first time on appeal an argument that the Board should have applied a stricter standard for examin-

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Hearing

[18-20] We think that the Board acted within its broad discretion in refusing to grant the Hospital an evidentiary hearing on its objections. It is elementary that a hearing must be held only where substantial, material issues of fact need to be resolved; that the burden is on the objecting party to proffer specific evidence to contradict the findings of the Regional Director; and, that this evidence must consist of more than a difference of opinion with the Regional Director's inferences and conclusions. *E. g., N. L. R. B. v. S. Prawer & Co.*, 584 F.2d 1099, 1102-03 (1st Cir. 1978); *N. L. R. B. v. O. S. Walker Co., Inc., supra*, at 817. *See* 29 C.F.R. § 102.69(c). Here, the Regional Director resolved most factual ambiguities in favor of the Hospital, and the Hospital can point to no substantial dispute about what occurred.[6] It only disputes the legal conclusions to be

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ing the Union's campaign practices because the setting of the representation contest was a hospital. For this proposition, it loosely relies on *N. L. R. B.* v. *Baptist Hospital, Inc.*, 443 U. S. 773, 99 S. Ct. 2598, 61 L. Ed. 2d 251 (1979), which partially reversed the Board's invalidation of a hospital's no solicitation rule in patient care areas. The Hospital in this case has established no factual basis for its argument nor has the Board had an opportunity to rule. We, therefore, refuse to consider in this case the impact of *Baptist Hospital* on the Board's standards for reviewing the campaign practices. We note only that nothing in this case suggests any interference with patients or medical care, the touchstones of *Baptist Hospital*.

[6]The most substantial question of fact was whether the telephone caller who claimed that the Hospital president had been indicted for Medicare fraud acted as an agent of the Union. The witness who received the call testified that the speaker identified himself as affiliated with the Union, but the witness could not recall his name nor had the witness ever heard his voice. The Union

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drawn from the fact of the occurrences and the estimation of the impact on the election. Such disagreement standing alone does not mandate a hearing.[7]

Order enforced.

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official who had made two similar calls was a woman. On this evidence, the Regional Director concluded that the call could not be attributed to the Union. The Hospital argues that the existence of other Union officials who were men created a question of fact which should have been resolved after a hearing. However, we think that the Regional Director's conclusion was supported by substantial evidence. The Hospital's argument amounts to no more than a disagreement about the correct inference to be drawn from the evidence and does not constitute in itself the kind of specific evidence contradicting the Regional Director's findings which, under *N. L. R. B.* v. *S. Prawer & Co., supra,* would mandate a hearing.

[7]Other arguments raised by the Hospital are too insubstantial to merit discussion.

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

No. 81-1668.

MOSEY MANUFACTURING COMPANY, INC., - - *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, - - - *Respondent*.

Argued January 14, 1982.
Reargued October 19, 1982.
Decided February 18, 1983.

After remand, 595 F. 2d 375, the National Labor Relations Board reinstated bargaining order and applied for enforcement. The Court of Appeals, Posner, J., held that: (1) Court, which could not have properly enforced the order without first requiring remand, would deny enforcement outright where Board had subjected employer to protracted legal expense and uncertainty by twice changing Board's mind as to whether it would protect workers from misrepresentations made in election campaigns; (2) substantial evidence standard is applicable in reviewing Board's findings in unfair labor practice cases relating to representation elections; and (3) Board's findings that union's claim during election campaign that it had gotten ten percent raise for workers at another plant was not false and that even if it were false, it would not be likely to have swayed the representation election were not supported by substantial evidence.

Enforcement denied.

Harlington Wood, Jr., Circuit Judge, specially concurred and filed opinion.

Cudahy, Circuit Judge, dissented and filed opinion.

Swygert, Senior Circuit Judge, dissented and filed opinion in which Cudahy, Circuit Judge, joined.

1. Labor Relations Key 703

Court of Appeals, which could not have properly enforced a bargaining order based on a finding that there had been no misrepresentation by union in election campaign, without first requiring a remand, would deny enforcement outright where more than five years had passed since union won election by one vote and National Labor Relations Board had subjected employer to protracted legal expense and uncertainty by twice changing Board's mind as to whether it would protect workers from misrepresentations made in election campaigns. Labor Management Relations Act, 1947, § 1(b), 29 U.S.C.A. § 141(b); National Labor Relations Act, § 9(c), as amended, 29 U.S.C.A. § 159(c).

2. Labor Relations Key 680

Substantial evidence standard, rather than abuse of discretion standard, is applicable in reviewing National Labor Relations Board's findings in unfair labor practice cases relating to representation elections. Labor Management Relations Act, 1947, § 1(b), 29 U.S.C.A. § 141(b); National Labor Relations Act, §§ 9(c), 10(e), as amended, 29 U.S.C.A. §§ 159(c), 160(e).

3. Federal Courts Key 812

Abuse of discretion standard is meant to be applied in reviewing decisions having one or more of the characteristics consisting of: that the factors that are supposed to dominate the decision cannot be evaluated by reviewing court; that the decision is supposed to be made on basis of

subjective rather than objective factors; and that uniformity among decisions is not important.

4. Labor Relations Key 214

In proceeding in which National Labor Relations Board reinstated bargaining order, Board's findings that union's claim during election campaign that it had gotten ten percent raise for workers at another plant was not false and that even if it were false, it would not be likely to have swayed the representation election, which union won by one vote, were not supported by substantial evidence. National Labor Relations Act, § 10(e), as amended, 29 U.S.C.A. § 160(e).

Leland B. Cross, Jr., Ice Miller, Donadio & Ryan, James S. Cunning, Indianapolis, Ind., for petitioner.

Peter Winkler, N.L.R.B., Elliott Moore, N.L.R.B., Washington, D.C., for respondent.

Before CUMMINGS, Chief Judge, PELL, BAUER, WOOD, CUDAHY, ESCHBACH, POSNER, and COFFEY, Circuit Judges, and SWYGERT, Senior Circuit Judge.

POSNER, Circuit Judge.

We ordered reargument of this case en banc before issuance of a panel opinion (see Circuit Rule 16(e)) in order to resolve a conflict among panels of this circuit over whether the proper standard of judicial review in cases involving the Labor Board's application of its election rules to particular facts is abuse of discretion or substantial evidence on the record as a whole.

On June 10, 1977, the carpenters' union was elected the collective bargaining representative for a unit of Mosey Manufacturing Company's workers. The election was decided by one vote. The company, alleging union misconduct in the election campaign, refused to bargain with the union. The union filed an unfair labor practice charge with the

Board, a complaint was issued, and the Board issued an order finding that the company had committed an unfair labor practice and ordering it to bargain with the union.

Two months before the election the Board had held, in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977), that it would no loger try to protect workers from misrepresentations made by either management or union in election campaigns, as it had done during the regime of *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962). In presenting its case to the Board, Mosey emphasized the union's alleged threats of physical violence during the campaign, because this was a good ground under *Shopping Kart* for setting aside the election, but it also tried to show that the union had misrepresented a wage increase which it had gotten for workers at another plant.

In April 1978 the Board applied to this court for enforcement of its order against Mosey. Shortly before oral argument, the Board decided *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978), in which it overruled *Shopping Kart* and reinstated *Hollywood Ceramics*, but without saying whether it meant the new rule to apply to pending cases. Although the Board's counsel urged this court to apply *Hollywood Ceramics* to this case, see *NLRB* v. *Mosey Mfg. Co.*, 595 F. 2d 375, 377 (7th Cir. 1979), we instead remanded the case to the Board, and "express[ed] no view on the merits of any objection to the election." *Id.* at 375 n. 2.

On remand the administrative law judge found that the union had made a material misrepresentation which in light of the close vote made the election invalid. The Board reversed. It found there had been no misrepresentation and in any event it had not been material. The Board reinstated the bargaining order and again applied to this court for enforcement. After the oral argument, but before the panel handed down a decision, the Board decided *Mid-*

land Nat'l Life Ins. Co., 263 N.L.R.B. No. 24, 110 L.R.R.M. 1489 (Aug. 4, 1982), which overruled *General Knit* and reinstated *Shopping Kart*. The Board stated that the new rule applied "to all pending cases in whatever stage." 263 N.L.R.B. No. 24 at p. 21 n. 24, 110 L.R.R.M. at 1494 n. 24.

[1] The Board's counsel urges us to enforce the Board's order on the basis of the *Shopping Kart* standard. We could not do this even if we were certain that the Board wanted that standard applied to this case. Mosey has never had judicial review of the Board's original order, which was based on the *Shopping Kart* standard. In this (the second) round of review proceedings, the parties, unaware of the extent of the Board's fickleness, thought the applicable standard would continue to be that of *Hollywood Ceramics* and did not brief or argue the case under *Shopping Kart*. The company's brief does mention the threats of physical violence that were the focus of its complaint when *Shopping Kart* was the ruling standard, but pushes them to the periphery of its argument; the core is misrepresentation. To decide this case under *Shopping Kart* we would have to dredge up the briefs that the parties filed in this court in 1978 or, more appropriately in view of the lapse of time, allow the parties to rebrief and reargue the issue.

But even this would not be good enough if it turned out that the company, while not entitled to relief under *Shopping Kart*, was entitled to relief under *Hollywood Ceramics*. True, the Board has *said* it will apply its new rule—the resurrected *Shopping Kart* rule—to all pending cases, and this is a pending case; and we may assume, as no contrary argument is made, that the Board has the broadest power to make rules for election disputes, to change those rules, to apply a changed rule retroactively, and to do all this in adjudicative decisions rather than in formal rule-making proceedings. But cf. *NLRB* v. *Majestic Weaving*

Co., 355 F. 2d 854, 859-62 (2d Cir. 1966). The present case is so unusual, however, that we cannot be sure it was in the Board's contemplation when the Board announced in a footnote that the new rule would apply to all pending cases. More than five years have passed since the union won the election by one vote. No one knows whether the carpenters' union is still preferred by a majority of the bargaining unit —it may be, but equally it may not be. In addition, by twice during this proceeding changing its mind as to the applicable standard the Board has put Mosey through the hoops, subjecting it to protracted legal expense and uncertainty (though at the same time, it must be admitted, allowing the company to stave off the evil day when it must bargain with the union). We cannot be certain that if this case is remanded the Board will apply *Shopping Kart* and order the company to bargain with a union that won an election by one vote, perhaps procured through misrepresentations, many years ago.

In these circumstances, unless we can properly enforce the Board's order without a remand, we shall deny enforcement outright. In asking us to enforce its order the Board is appealing to our equitable powers, cf. *NLRB* v. *Apico Inns of California, Inc.*, 512 F. 2d 1171, 1175 (9th Cir. 1975), and we must ask what equity the Board would have if, after again ordering the company to bargain with the union, it came back to us asking for enforcement of its order. The election would still have been won by only one vote, but not five years ago, rather six or seven, the whole interval due mainly to the Board's inability to decide what standard to use in policing elections—it has changed its collective mind three times in the last five and a half years. When a party asking a court to do equity has strung out the proceeding to the point where the court cannot determine whether equitable relief would achieve the legitimate purposes of the suit, which in this case is to give a unit of Mosey's

workers the collective bargaining representative of their choice, the court will withhold its assistance. See, e.g., *NLRB* v. *Nixon Gear, Inc.*, 649 F. 2d 906, 914 (2d Cir. 1981); cf. *NLRB* v. *Majestic Weaving Co., supra*, 355 F. 2d at 86. The best protection for these workers' freedom of choice would be a prompt new election, which a remand will not accomplish.

A shorter Board-caused delay in an election that was not nearly so close persuaded the Second Circuit recently to deny enforcement of the Board's bargaining order outright rather than to remand, *NLRB* v. *Connecticut Foundry Co.*, 688 F. 2d 871, 881 (2d Cir. 1982), and the present case is an even stronger one for outright denial—provided Mosey has a winning case under *Hollywood Ceramics*. If it does not it has no basis for resisting enforcement. The only issue Mosey asked us to decide in this round of judicial review was whether the election should be set aside under the *Hollywood Ceramics* standard. So long as that standard seemed to be the law—so long as it was applied to this case—the company was content to proceed under it and not try to make out a case under *Shopping Kart*. If Mosey has no case under *Hollywood Ceramics*, it cannot complain if we order enforcement. So we must decide whether the Board's order is valid under *Hollywood Ceramics*.

A week before the election the union told Mosey's workers that it could get them a 10 percent raise because it had gotten such a raise for workers at another plant. It had not; the raise had only been 5 percent. The Board found, on the basis of an argument that its General Counsel had not thought worth making to the administrative law judge, that the raise was 10 percent if certain cost of living increases were included. Even so, the union's failure to explain this qualification was misleading: it allowed Mosey's workers to think that the union would get them 10 percent above whatever cost of living increases they could expect to

receive anyway in a period of high inflation (as 1977 was)—and had received, before the union came on the scene. So there was misrepresentation, it concerned a matter of vital interest to workers ("Among the various types of campaign misrepresentations, the courts have been least tolerant of distortions involving wages," *Peerless of America, Inc.* v. *NLRB*, 576 F. 2d 119, 124 (7th Cir. 1978)), and it was made in the course of a closely fought campaign. It could have swayed a single vote and that was all that would have been necessary to change the outcome.

These facts persuaded the administrative law judge that the election should be set aside under *Hollywood Ceramics;* the Board's contrary conclusion is not, in our judgment, supported by substantial evidence on the record as a whole. But neither is it so egregious, so unreasonable, that it is an abuse of discretion—assuming that this is a distinct, and narrower, standard of review than substantial evidence. The assumption is necessary, since if the standards are the same the Board's order is invalid under either.

Abuse of discretion is the standard of review of findings in election cases in the First, Fourth, and Tenth Circuits, see *NLRB* v. *S. Prawer & Co.*, 584 F. 2d 1099, 1101 (1st Cir. 1978); *NLRB* v. *Fenway Cambridge Motor Hotel*, 601 F. 2d 33, 36 (1st Cir. 1979); *Schneider Mills, Inc.* v. *NLRB*, 390 F. 2d 375, 378 (4th Cir. 1968); *Kustom Electronics, Inc.* v. *NLRB*, 590 F. 2d 817, 822 (10th Cir. 1978), though only the First Circuit has given reasons for its choice. The Third, Fifth, Sixth, and Ninth Circuits either use substantial evidence as the sole standard or treat "abuse of discretion" as synonymous in this context with "unsupported by substantial evidence." See *Jamesway Corp.* v. *NLRB*, 676 F. 2d 63, 67-69 (3d Cir. 1982); *NLRB* v. *South Miss. Elec. Power Ass'n*, 616 F. 2d 837, 839 (5th Cir. 1980); *Harlan # 4 Coal Co.* v. *NLRB*, 490 F. 2d 117, 120, 124-25 (6th Cir. 1974); *NLRB* v. *Big Three Industries, Inc.*, 602 F. 2d 898,

901 (9th Cir. 1979). The Second and Eighth Circuits are hard to "read" on the issue but seem to treat the two standards as interchangeable. See *Bausch & Lomb Inc.* v. *NLRB*, 451 F. 2d 873, 876, 877 n. 6 (2d Cir. 1971); *La-Crescent Constant Care Center, Inc.* v. *NLRB*, 510 F. 2d 1319, 1324 (8th Cir. 1975); *NLRB* v. *Target Stores, Inc.*, 547 F. 2d 421, 424-25 (8th Cir. 1977).

In this circuit, a number of decisions apply the abuse of discretion standard: *Macomb Pottery Co.* v. *NLRB*, 376 F. 2d 450, 452 (7th Cir. 1967); *Follett Corp.* v. *NLRB*, 397 F. 2d 91, 94 (7th Cir. 1968); *NLRB* v. *Red Bird Foods, Inc.*, 399 F. 2d 600, 602 (7th Cir. 1968); *Louis-Allis Co.* v. *NLRB*, 463 F. 2d 512, 519 (7th Cir. 1972); *NLRB* v. *Martz Chevrolet, Inc.*, 505 F. 2d 968, 970 (7th Cir. 1974); *NLRB* v. *Southern Health Corp.*, 514 F. 2d 1121, 1123-24 (7th Cir. 1975). Others apply the substantial evidence standard (one is the previous panel decision in this case, and arguably therefore is the law of the case): *Celanese Corp. of America* v. *NLRB*, 291 F. 2d 224, 225 (7th Cir. 1961); *NLRB* v. *Mosey Mfg. Co., supra*, 595 F. 2d at 377 n. 5; and *Midwest Stock Exchange* v. *NLRB*, 620 F. 2d 629, 632 (7th Cir. 1980). One equates the two standards: *Peerless of America, Inc.* v. *NLRB, supra*, 576 F. 2d at 122. Although our most recent decision (*Midwest*) applied the substantial evidence standard, its persuasiveness is weakened by the fact that it does not mention the decisions in which other panels of the circuit had taken a contrary approach; and a subsequent dictum in *Advertisers Mfg. Co.* v. *NLRB*, 677 F. 2d 544, 546 (7th Cir. 1982), revives "abuse of discretion."

[2] Obviously the issue should not be settled by counting noses, even distinguished judicial ones. We have to take a fresh look at the issue and we begin by observing that the statute which governs judicial review of Labor Board orders, section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), states that the Board's findings of

fact shall be conclusive provided they are "supported by substantial evidence on the record considered as a whole." There is no express exception for unfair labor practice cases growing out of representation elections and no obvious reason why the courts should imply one. The finding that a statement made in an election campaign was true, or substantially true, or if false immaterial is the kind of fact-finding that normally is reviewed under the substantial evidence standard, whether in a securities case, see, e.g., *TSC Industries* v. *Northway, Inc.*, 426 U. S. 438, 450, 96 S. Ct. 2126, 2133, 48 L. Ed. 2d 757 (1976); *Sundstrand Corp.* v. *Sun Chem. Corp.*, 553 F. 2d 1033, 1048 (7th Cir. 1977); *SEC* v. *Falstaff Brewing Corp.*, 629 F. 2d 62, 76 (D.C. Cir. 1980), or a Federal Trade Commission false-advertising case, see, e.g., *Porter & Dietsch, Inc.* v. *FTC*, 605 F. 2d 294, 300 (7th Cir. 1979); we cannot see why it should not be reviewed under the same standard in an election case.

It is true but irrelevant that direct judicial review of the Board's decision to certify a collective bargaining representative on the basis of an election is extremely limited. The purpose is to prevent delay, rather than to narrow the scope of judicial review of the decision in the event the employer refuses to bargain with the union and an unfair labor practice action is brought against him. See section 9(d) of the Act, 29 U.S.C. § 159(d); *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 477, 84 S. Ct. 894, 896-897, 11 L. Ed. 2d 849 (1964).

It is also true, but again irrelevant, that the Board enjoys an unusually broad discretion in deciding what rules to apply to election campaigns. This is because the Board has founded its authority to issue such rules on two statutory provisions that contain no standards—the preamble to the Taft-Hartley Act, 29 U.S.C. § 141(b), and section 9(c) of the National Labor Relations Act, 29 U.S.C. § 159(c), which authorizes the Board to conduct representation elec-

tions. See *Hollywood Ceramics, supra*, 140 N.L.R.B. at 223 and n. 3; *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953). That is why the Board can go from *Shopping Kart* to *Hollywood Ceramics* and back again without judicial interference. The courts that have applied an abuse of discretion standard to election disputes have done so precisely because the Board's authority to regulate elections is plenary, but in so doing have overlooked the difference between discretion in formulating rules and discretion in applying them to facts.

We may assume that the soundness of an election rule is not the business of the reviewing court. But it is its business to make sure that the rule is applied to the facts in a responsible fashion, and this traditionally has meant in accordance with the substantial evidence standard. It makes no difference whether the rule comes from Congress directly or through its delegate, the Board, indirectly. The Board does not have a broader discretion in devising election rules than Congress itself would have; yet even if the rule had come from Congress the substantial evidence standard would be used to determine whether the Board was applying the rule correctly. Judicial review should not be more limited just because the Board rather than Congress is the rulemaker.

[3] Moreover, the abuse of discretion standard is out of place here. It is meant for the review of decisions that have one or more of the following characteristics: the factors that are supposed to dominate the decision cannot be evaluated by the reviewing court; the decision is supposed to be made on the basis of subjective rather than objective factors—the individual judgment of the judge or administrator, rather than some articulable legal standard; uniformity among decisions is not important. See *Noonan* v. *Cunard S.S. Co.*, 375 F. 2d 69, 71 (2d Cir. 1967). A decision applying a Board-created election rule to contested

facts has none of these characteristics. If the rule forbids material misrepresentations, as the rule of *Hollywood Ceramics* does, then deciding whether a representation is false, and if so materially, requires the application of an objective standard (material falsehood) to evidence, rather than an exercise of discretion. The Board's determination of the appropriate bargaining unit illustrates discretionary judgment, see *Lammert Industries* v. *NLRB*, 578 F. 2d 1223, 1225 (7th Cir. 1978), as does its formulation of election rules. But the natural standard to use in evaluating the application of a rule to facts is substantial evidence.

[4] The two Board findings challenged in this case—that the union's claim of what it had done for workers at another plant was not false, and that if it were false it would not be likely to sway the election—are factual in nature, and being unsupported by substantial evidence on the record as a whole are invalid. That means that if this case is governed by the *Hollywood Ceramics* standard, under which elections are set aside if there are material misrepresentations in the campaign, the Board's order must be set aside. *Midland* suggests that the Board probably, but not certainly, would apply the *Shopping Kart* standard to this case instead, because it is a pending case. Hence if there were no problem of Board-caused delay, we would not deny enforcement on the basis of *Hollywood Ceramics* but would remand the case for the Board to decide whether to apply its new standard. Since the long delay in this matter due to the Board's indecision has persuaded us that the case should not be remanded, that leaves us with no choice but

ENFORCEMENT DENIED.

HARLINGTON, WOOD, JR., Circuit Judge, concurring.

I fully concur in the denial of enforcement of the Board's order, but in the particular circumstances of this case, I come to that view more directly.

This story began back in 1977, over five years ago, when the disputed representation election was held. Mosey Mfg., a modest sized company, then had 72 production and maintenance employees eligible to vote. The union won by one vote, but the company refused to bargain because of various alleged deficiencies of the Board and union.

This case first came here for enforcement consideration in 1977, but we felt compelled to remand, observing that the applicable area of labor law was "recently subjected to great flux." *N.L.R.B.* v. *Mosey Mfg. Co., Inc.*, 595 F. 2d 375, 376 (7th Cir. 1979). That "great flux," it now appears, was not over.

From 1962 to 1977 the standard articulated in *Hollywood Ceramics Co.*[1] applied, but in April 1977 a Board majority in *Shopping Kart Food Market, Inc.*[2] overruled *Hollywood Ceramics*, and the "flux" began. *Shopping Kart* was in vogue at the time of the election, and remained so until after the Board's decision and order. Then in 1978, in *General Knit of California, Inc.*,[3] the Board deserted *Shopping Kart* and went back to *Hollywood Ceramics*. The briefs, in our first review of this case, argued *Shopping Kart*, but at oral argument the parties were arguing *Hollywood Ceramics*. This court declined to try to sort through it, and reasoned that it "would be incompatible with an orderly process of judicial review" for this court "to become embroiled in the shifting currents of the Board's efforts to settle upon its standards," labeling them as "on-again, off-again." 595 F. 2d at 377.

The case therefore was sent back to the Board which in turn reinstated its bargaining order, and has now come back again to have this court enforce the order. So, this

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[1]140 N.L.R.B. 221 (1962).

[2]228 N.L.R.B. 1311 (1977).

[3]239 N.L.R.B. 619 (1978).

court heard oral argument again, but not long after that and before the matter could be decided, the Board, in *Midland Nat'l Life Ins. Co.*,[4] abandoned *General Knit* and took up again with *Shopping Kart*. So far as I can tell that is where we are at the moment. "On-again, off-again" is apparently on-again. Against that confusing background of delay traceable to the bureaucratic oscillation of the Board I would separate this case from those with ordinary delays, draw the line, and deny enforcement relying on the precedent of practical common sense. I view whatever standard the Board claims today supports its order to be irrelevant in this case now.

Five years ago one employee of this company cast the deciding vote in the contested election. Who the employees of *Mosey Mfg.* may be today, or what their thoughts may be about their own representation, we have not the slightest idea. One way to find out, however, is to give the current employees the opportunity to have a new election, if they so choose, so that they may have some voice in their own futures. The circumstances of this case are reason enough, I believe, to cut through it all directly to that end. If any problems were to arise during a new election, those problems optimistically could be resolved on an expedited basis by the Board, and by this court if necessary.

The Board admittedly has the right to change its mind, but there must be a limit to the Board's right to impose the burdens of its own unstable expertise on others, employees, employers, and courts alike.

CUDAHY, Circuit Judge, dissenting.

I join fully in Judge Swygert's persuasive dissent. The majority has engaged in an extraordinary exercise of judicial activism in essentially substituting its judgment for

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[4]263 N.L.R.B. No. 24, 110 L.R.R.M. 1489 (Aug. 4, 1982).

that of the Board on what would sway a union election. I write separately to stress two points.

First, I see no reasonable basis for uncertainty about whether the Board would want the *Shopping Kart* standard and not the *Hollywood Ceramics* standard applied to this case. In *Midland*, in addition to stating that *Shopping Kart* would apply " 'to all pending cases in whatever stage,' " the Board stated that "failure to [apply *Shopping Kart*] would be contrary to the 'statutory design.' For . . . we believe that, on balance, the *Hollywood Ceramics* rule operates more to frustrate than to further the fundamental statutory purpose of assuring employee free choice." *Midland National Life Insurance Co.*, 263 N.L.R.B. No. 24 at p. 21 n. 24, 110 L.R.R.M. 1489, 1494 n. 24 (1982) (citation omitted). In light of this language there is no need to remand.

Second, even if remand were necessary, I am not so certain as the majority apparently is that application of "equitable" principles should preclude such a remand. I *am* certain, however, that the equities are not one-sidedly in favor of the employer. Strikingly absent from the majority's discussion of equity is any recognition that denying enforcement of the bargaining order subjects the employees to further delays in effectuating their right to collective representation. The majority's assumption that "[t]he best protection for these workers' freedom of choice would be a prompt new election," *supra* at 613, ignores the fact that, notwithstanding the Board's changes in standards, the employer in this case was able to negate the employees' choice from June 10, 1977, the date of the election, until at least March 27, 1979, the date of our first review of this election, a review to which the employer is of course en-

titled.[1] I know of nothing to insure that the enjoyment of the fruits of a "prompt new election" will not also be delayed for up to two years.

In sum, I see nothing equitable about a result which, when all is said and done, results in these *employees* losing their statutory right to representation because the majority is annoyed at the "fickleness" of the *Board*. I think that such an outcome has no sanction in the Act or in the decided cases.

Therefore, I respectfully dissent.

SWYGERT, Senior Circuit Judge, with whom Circuit Judge CUDAHY joins, dissenting.

This case has been buffeted by the alternating tides of the National Labor Relations Board's decisions to invalidate labor elections during which last-minute, material, substantial misrepresentations are made, *see General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978); *Hollywood Ceramics Co.*, 140 N.L.R.B. 220 (1962), or to ignore such misrepresentations in evaluating whether "laboratory con-

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[1] The timetable was as follows:

April 15, 1977	Union representation petition filed.
June 10, 1977	Election.
June 17, 1977	Investigation of election in response to company objections.
July 20, 1977	Regional Director's certification of Union.
September 22, 1977	Board denial of review.
October 5, 1977	Company's refusal to bargain.
November 15, 1977	General Counsel's issuance of unfair labor practice complaint.
February 13, 1978	Board's order to bargain.
April 25, 1978	Board application for enforcement to Seventh Circuit.
March 27, 1979	Seventh Circuit's remand.

See Joint Appendix at 30-31.

ditions" have been spoiled, *see Midland National Life Insurance Co.*, 263 N.L.R.B. No. 24 (1982); *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977). The election at issue here took place under the reign of *Shopping Kart*, the standard the Board readopted in *Midland* and which is currently in effect. The Board has reviewed and upheld the election under both standards against claims that Board misconduct and union threats, misrepresentations, and improper promises of benefits spoiled the laboratory conditions. *See Mosey Manufacturing Co.*, 255 N.L.R.B. 552, 553 (1981) (upholding election under *Hollywood Ceramics* standard); *Mosey Manufacturing Co.*, 234 N.L.R.B. 908, 908 & n. 2 (1978) (upholding election under *Shopping Kart* standard); *Mosey Manufacturing Co.*, No. 25-RC-6619 (N.L.R.B. July 20, 1977) (representation proceeding) (upholding election under *Shopping Kart*). It is an unfortunate coincidence that each time these decisions reached this court for review, the standard had shifted; nevertheless, it is clear that the Board views its certification as proper in any case. Our task is to review the propriety of that certification.

A majority of this court now holds that enforcement of the bargaining order must be denied, reasoning that because the result of our review would differ depending on which of the Board's two tests is applied, and because we do not know which test the Board would choose to apply in this case or how it would evaluate the company's non-misrepresentation objections, remand to the Board would be necessary; and that the resulting delay would so compound the existing delay from the date of the election that any future appeal to enforce would lack equity. This rationale rests on four premises: first, that the Board's decision to uphold the election under the *Hollywood Ceramics* standard is not supported by substantial evidence; second, that remand is necessary to determine whether the

Board would apply *Midland* retroactively to this case; third, that remand is necessary to allow the Board to evaluate the company's other objections; and fourth, that lapse of time is a sufficient basis to deny enforcement of the bargaining order. Because I disagree with each of these premises, I respectfully dissent.

I

The Board's decision that the election was valid under the *Hollywood Ceramics* criteria is faultless. The majority properly identifies our standards of review: as in other contexts, Board rules must be upheld unless it was an abuse of discretion to adopt them, and adjudications applying those rules must be upheld if they are supported by substantial evidence. Having identified the standards, however, the majority fails to identify the Board rule in question precisely and fails to detail in what respect substantial evidence for its adjudicatory decision is lacking.

Hollywood Ceramics established, as the majority correctly notes, that laboratory conditions may be spoiled by material misrepresentations preceding an election. More particularly,

> the Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted.

Hollywood Ceramics Co., 140 N.L.R.B. at 223. In reviewing the Board's application of these standards, a court is not free to interpret the rule as a statute (supplying its own interpretation of materiality, for instance), because the Board has refined the rule, supplying its own interpretation of the rule's elements, as it is entitled to do. *See Charles D.*

Bonanno Linen Service, Inc. v. *NLRB*, 454 U. S. 404, 413, 417-18, 102 S. Ct. 720, 725, 727-728, 70 L. Ed. 2d 656 (1982). These refinements are reviewable only for abuse of discretion. *Id.* The fact that these independent instances of "rulemaking" are conducted in the course of adjudicating particular cases blurs the line between rulemaking and adjudication. Judicial review would be simpler if these categories were more distinct, but we are bound by the Supreme Court's view that the Board may announce new standards in adjudications. *See NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 294, 94 S. Ct. 1757, 1771-1772, 40 L. Ed. 2d 134 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767, 770-71, 89 S. Ct. 1426, 1430, 1432, 22 L. Ed. 2d 709 (1969) (plurality opinions).

It is possible to construe the Board's decision to uphold the election in the present case as an interpretation of what kinds of misstatements would offend the general *Hollywood Ceramics* standard—in other words, a refinement of the general standard. Because the determination of disruption of laboratory conditions is so fact-dependent, *see General Knit of California, Inc.*, 239 N.L.R.B. at 622, it may be difficult to formulate comprehensive standards in advance. In similar circumstances in *NLRB* v. *Bell Aerospace Co.*, 416 U. S. at 294, 94 S. Ct. at 1771-1772 (approving the Board's adjudicatory decision that a certain buyer was not a "managerial employee"), the Supreme Court noted that

> [i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility. The Board thus has reason to proceed with caution, developing its standards in a case-by-case manner with attention to the specific character of the buyers' authority and duties in each company. The Board's judgment that adjudication best serves this purpose is entitled to great weight.

See also NLRB v. *J. Weingarten, Inc.*, 420 U. S. 251, 265, 95 S. Ct. 959, 967, 43 L. Ed. 2d 171 (1975) ("The use by an administrative agency of the evolutional process is particularly fitting."). Standards developed in this ongoing fashion are assailable only if they are arbitrary or contrary to law; a court may not substitute its judgment on debatable issues for the Board's. *See Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U. S. at 413, 417-18, 102 S. Ct. at 727-728. The fact that the Board may sharply constrict its review of misrepresentations, *see Linn* v. *United Plant Guard Workers Local 114*, 383 U. S. 53, 60, 86 S. Ct. 657, 661-662, 15 L. Ed. 2d 582 (1966), a power it has exercised to restrict still further the rule it announced in *Midland*, *see Affiliated Midwest Hospital, Inc.*, 264 N.L.R.B. No. 146, at 6 (1982) (Board now will intervene only when its own documents are misrepresented), demonstrates that it is debatable whether misrepresentations—either generally or in particular cases—undermine the legitimacy of elections. If the Board was pursuing this evolutionary standard-making process in its *Mosey* decision, 255 N.L.R.B. 552 (1981), therefore, we may review its order only for arbitrariness or abuse of discretion, a showing the majority has not made.

Even if we view the Board's decision as pure adjudication, with no element of rule-making, however, the majority's analysis is faulty, for it ignores past refinements and interpretations of the *Hollywood Ceramics* rule. It is against that body of rules, and not the bare statement quoted above, that we must measure the Board's decision.

From the time it formulated its material misrepresentation rule the Board emphasized that it would exercise its power to invalidate elections sparingly. In *Hollywood Ceramics* itself, the Board emphasized that elections "should not be lightly set aside," partly because of its respect for the integrity of the government-conducted,

secret-ballot process, partly because it viewed repeated elections as harmful to labor relations, and partly because "absolute precision of statement and complete honesty are not always attainable in an election campaign, nor are they expected by the employees." 140 N.L.R.B. at 223. It concluded that elections should be invalidated only in cases of untruths so substantial yet so believable as to be likely to have affected the outcome:

> We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation . . . may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations will not suffice to establish such misrepresentation as would lead us to set the election aside. Such ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts, frequently occur in communication between persons. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election.

Id. at 224 (footnotes omitted).

In applying *Hollywood Ceramics* the Board occasionally felt compelled to remind parties (and perhaps the regional directors) that its intervention would be extraordinary. *See Modine Manufacturing Co.*, 203 N.L.R.B. 527, 530 (1973), *enforced*, 500 F. 2d 914 (8th Cir. 1974):

[W]e ought not be casual or overready to agree either that the secret ballot choice of a majority of the eligible voters, made under closely supervised balloting conditions, be disregarded or that it await finality while we undertake further administrative proceedings, and encourage further litigation. At least we must carefully weigh in the balance whether considerations of protecting the integrity of our elections are, under all of the circumstances, sufficiently significant to warrant a further expenditure of public funds, a further investment of the time of our personnel, and, as here, a delay in the commencement of collective bargaining on behalf of the employees by the agent they have selected. . . .

. . . .

. . . We have . . ., in entering this difficult area at all, exercised an abundance of administrative caution. In applying that abundance of caution, however, we believe we must again be cautious.

. . . .

. . . [O]ur experience has taught us how easy it is for an objecting party in any heated campaign to seize upon some sentence, or some paragraph, in the final propaganda effort by one of the participants and find therein a claimed departure from solid fact or objective truth, and demand that we hold a hearing as to its verity and as to the still more elusive issues of materiality to the voter's choice and its probable—or possible—impact on that choice.

. . . .

. . . [T]here must be a reasonably flexible and not too constrained or rigidly controlled area left for administrative expertise in determining, in the best judgment we can muster from our knowledge and experience in the field, and in the exercise of sound adminis-

> trative discretion, what circumstances justify . . . invalidating an election . . . .

The difficulty of maintaining these limitations on intervention impelled the Board in *Shopping Kart* to curtail intervention almost completely. 228 N.L.R.B. at 1312-13; *id.* at 1314 (Chairman Murphy, concurring) (accepting the majority's view because *Hollywood Ceramics* had been expanded beyond the original intent to interfere only "in the most extreme situations"). It is true that the Board quickly forswore this hands-off policy, *see General Knit*, but only on condition that the readopted *Hollywood Ceramics* rule would be applied strictly. In restating the rule, the Board noted:

> The *Shopping Kart* majority clearly thought the *Hollywood Ceramics* rule failed to take . . . into account [employees' ability as mature adults to evaluate campaign rhetoric]. In this, they were in error. Rather, the principles of *Hollywood Ceramics* clearly recognize employee ability to assess the bulk of campaign propaganda. As can be discerned from the general principle in that decision, . . . the area of the Board's concern involving alleged misrepresentations is truly a circumscribed one.

General Knit, 239 N.L.R.B. at 620.

The Board's abstract formulations of its rule left no doubt that its scrutiny would be shallow. Its wavering between never upsetting elections and upsetting them in a limited class of cases, demonstrating its hesitancy to interfere at all, reinforces its assertions that successful *Hollywood Ceramics* challenges should be rare. The best indication of what the Board actually means by misrepresentations so substantial as to impair the validity of an election, however, is its practice in adjudicating particular cases.

In many cases the Board has overruled objections to elections based on erroneous wage comparisons made by unions, employees, or employers, often rejecting the findings of the regional director or trial examiner, as it did in the present case. In *National Waterlift Co.*, 175 N.L.R.B. 849 (1969), for example, the objection concerned the employer's misrepresentations concerning the wages and benefits at competing companies. Although the regional director had found the misrepresentations to be substantial, the Board refused to invalidate the election, which the union has lost, because it found the inaccuracies to be "at worst an imprecise expression not uncommon in campaign literature," recognizable as such by the employees. *Id.* at 850. Similarly, in *Russell-Newman Manufacturing Co.*, 158 N.L.R.B. 1260 (1966), the employer challenged an election won by the union because of campaign propaganda in which the union listed wage and benefit increases it had negotiated at other plants, but failed to note that the increases would take effect over a three-year period rather than all at once. The trial examiner found these misrepresentations substantial enough to invalidate the election. The Board rejected that finding, noting that under the *Hollywood Ceramics* rule "it would not set aside an election on the basis of propaganda where the message i[t] sought to convey was merely 'inartistically or vaguely worded and subject to different interpretations,' " and concluding "that the Union's propaganda . . ., at worst, was an exaggeration of fact, subject to different interpretations, and as such would not constitute a sufficient basis for setting aside an election. Indeed, we note that a characterization of a three-step wage increase in terms of a total package is now a relatively common method of announcing such benefits . . . ." *Id.* at 1264. These cases indicate how narrowly the Board construed its substantial-misrepresentation rule.

Nor are these cases aberrations from the Board's usual practice. *See, e.g., National Medical Hospital*, 251 N.L.R.B. 842, 844 (1980) (wage comparison, used to show benefits of unionization, was not a material misrepresentation despite the fact that some of the competitors compared were nonunionized) (rejecting regional director's findings); *Beaird-Poulan Division, Emerson Electric Co.*, 247 N.L.R.B. 1365, 1383-85 (1980) (wage comparison was not misleading despite lack of comparability of job classifications), *enforced*, 649 F. 2d 589 (8th Cir. 1981); *Rex-Hide, Inc.*, 241 N.L.R.B. 1178, 1179 (1979) (misrepresentation of wage increases won by union at another company "constituted normal election propaganda which was not substantially or materially misleading"); *Miller's Pre-Pared Potato Co.*, 240 N.L.R.B. 1302, 1302-03 (1979) (wage comparison was not misleading despite lack of comparability of job classifications); *Conalco, Inc.*, 225 N.L.R.B. 879, 880 (1976) (erroneous wage comparison prepared by employees, used to show lack of benefit of unionization, was not a material misrepresentation) (rejecting regional director's findings); *Tri-Ex Tower Corp.*, 224 N.L.R.B. 680, 680 (1976) (employer's false statement that unionized employees had gained no benefits from strike was not a material misrepresentation) (rejecting regional director's findings); *Southern Health Corp.*, 201 N.L.R.B. 462, 465 (1973) (wage comparison was not misleading despite fact that negotiated wage increases could not be implemented because of government wage and price freeze), *enforced*, 514 F. 2d 1121 (7th Cir. 1975); *Southern Foods, Inc.*, 171 N.L.R.B. 999, 1000-01 (1968) (union's exaggeration of benefits won by competitor's unionized employees was not misleading "in view of the volume and nature of permissible propaganda utilized by both sides in [the] campaign," because employees would not credit the union's "self-serving, puffing statement") (rejecting regional director's findings), *enforcement denied*,

434 F. 2d 717 (5th Cir 1970); *Follett Corp.*, 160 N.L.R.B. 506, 508-09 (1966) (misstatements in wage comparison were not substantial in context of entire campaign) (rejecting regional director's findings), *enforced*, 397 F. 2d 91 (7th Cir. 1968); *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236, 1247 (1966) (misstatements in employer's campaign letters were not substantial because of partisan electioneering context) (rejecting regional director's findings).

The inaccuracies in *National Waterlift* and *Russell-Newman* are similar to those alleged in the present case. As in *Russell-Newman*, the Board in *Mosey*, 255 N.L.R.B. at 553, considered the inclusion in the stated pay increase of extra benefits (here, the cost-of-living increase; there, the future base pay increases) not inaccurate. In both cases the statement in issue employed a common method of describing increases. As in *National Waterlift*, the Board in *Mosey, id.*, found any inaccuracies that did exist to be not misleading because of their context. In both cases the Board judged the employees capable of evaluating the statements as the kinds of exaggerations common to campaigns. Indeed, the statement in *Mosey* was even less likely to mislead because it was in response to the employer's deliberately provocative "put up or shut up checklist,"* and because it guaranteed zealous support rather than a particular wage increase. *Cf. Archer Laundry Co.*, 150 N.L.R.B. 1427, 1435 (1965) (guarantee of support is per-

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*A week before the election the company sent the employees a letter titled "CARPENTER ORGANIZER'S PUT UP OR SHUT UP CHECKLIST," which challenged the employees to ask the union to subscribe to the following pledge, among others:

> I guarantee that if the Carpenter's Union wins the election you will receive a bigger wage increase than you would receive without the Union.
>
> Signed:_____ Date:_____
> Carpenter's Union Representative

missible campaign propaganda). Both the tone and the context of the response made it unlikely, in the Board's view, to affect the election's outcome. In fact, the *Mosey* decision is stronger than *Russell-Newman* or *National Waterlift* because of its combination of their rationales: *Mosey* challenges both the alleged inaccuracy and its tendency to mislead. This conclusion comports with the Board's general view that most campaign rhetoric is capable of assessment by employees and is therefore not so deceptive as to invalidate an election. *See Melrose-Wakefield Hospital Association* v. *NLRB*, 615 F. 2d 563, 567 (1st Cir. 1980) ("The *Hollywood Ceramics* policy contemplates that only a narrow range of campaign propaganda and misrepresentations require[s] Board intervention . . . ."). This court has recognized that it is within the Board's discretion to determine in what conditions employees will be deemed capable of evaluating wage comparisons. *Peerless of America, Inc.* v. *NLRB*, 576 F. 2d 119, 125 (7th Cir. 1978). A reviewing court may not substitute its judgment for the Board's on whether those conditions are met if the Board's judgment is supported by substantial evidence. *See NLRB* v. *Lyon & Ryan Ford, Inc.*, 647 F. 2d 745, 750 (7th Cir.), *cert. denied*, 454 U. S. 894, 102 S. Ct. 391, 70 L. Ed. 2d 209 (1981). If those conditions are met the closeness of the vote does not call into question the election's validity. *See NLRB* v. *Southern Health Corp.*, 514 F. 2d 1121, 1125 (7th Cir. 1975); *NLRB* v. *Visual Educom, Inc.*, 486 F. 2d 639, 643 (7th Cir. 1973).

The company also objects to several other instances of alleged misrepresentations: a statement, first made two weeks before the election, that the employer discharged all but eight pro-union employees following a prior unsuccessful campaign; a statement, made twenty-six days before the election, that the company's contracts prevented it from ceasing business; a statement, made twenty-six days before

the election, that the employer could not reduce wages and benefits if the union won; and a statement, made fifty-one days before the election, that the employer could not close the plant and start any other business anywhere in the country. Apart from any other considerations, these statements do not constitute a basis for invalidating the election under the *Hollywood Ceramics* rule because, as the regional director noted, *Mosey Manufacturing Co.*, No. 25-RC-6619, at 6, 7 n. 4, the employer had ample time to reply.

I conclude that under the *Hollywood Ceramics* standard (a standard that has not been challenged as arbitrary, capricious, an abuse of discretion, or contrary to law), the Board would refuse to certify election results only in extraordinary circumstances, and that substantial evidence supports its determination that such circumstances were not present here. The majority concedes that if the Board's certification was proper under this standard as well as under the still more restrictive *Shopping Kart/Midland* standard, we must enforce its bargaining order, because the company has not then been prejudiced by the Board's vacillations. *Ante* at 613. My conclusion that *Hollywood Ceramics* has been satisfied therefore is dispositive. Because I consider the majority's analysis to be fatally flawed in other respects as well, however, I explain my additional reservations below.

II

The majority argues that we cannot be certain that the Board would apply the *Shopping Kart/Midland* standard to this case, and the consequently necessary remand (assuming that the result would be different if *Hollywood Ceramics* criteria were applied) would create such delay that future enforcement of the bargaining order would be inequitable. But the Board has expressed its intention to apply its current rule retroactively, in accordance with its

usual practice. *Midland*, 263 N.L.R.B. No. 24, at 21 n. 24. Courts often enough remind agencies of their duty to follow their own rules that it would be odd for us to assume that the Board might not do so in this case.

Moreover, we have good indications that the Board would not consider this an extraordinary case, calling for an exception to its retroactivity rule. In *Rex-Hide, Inc.*, 241 N.L.R.B. 1178, 1179 n. 7 (1979), after noting its traditional practice of applying new rules to all pending cases, the Board applied the *Hollywood Ceramics* rule to an election conducted under that standard, challenged under *Shopping Kart*, and decided under *General Knit*. It reasoned that the shifts in policy did not penalize the parties because the standard it applied was identical to the one in effect at the time of the election. *See also Miller's Pre-Pared Potato Co.*, 240 N.L.R.B. at 1302 & n. 4. The same reasoning applies here: it is not inequitable to review an election conducted during the reign of *Shopping Kart* by that very standard, because the interim shifts in Board policy could not have affected the parties' behavior. Indeed, the present case is a stronger one than *Rex-Hide* for retroactivity because the Board now considers campaign propaganda an unfit subject for review, making the parties' behavior irrelevant. It would be irrational for the Board to scrutinize propaganda that it considers categorically immaterial, even if the election had been conducted under a different standard or would have failed on more intrusive review. Whether the parties relied on the Board's rule by conforming their behavior to it is irrelevant to the extent that their behavior itself is deemed irrelevant.

I therefore conclude that the Board would apply *Midland* to this case, making certification proper even if the election would have been invalidated under the *Hollywood Ceramics* test (which I do not concede). It is unnecessary to remand this issue.

III

The majority also argues that remand is necessary because we do not know how the Board would evaluate the company's nonmisrepresentation objections. But it is disingenuous to say that we are uninformed about the Board's view and that "Mosey has never had judicial review" of this issue, *ante* at 612, for the Board considered and rejected these objections long ago, *see Mosey Manufacturing Co.*, 205 N.L.R.B. at 553 (adopting the findings of the ALJ), and we may review that determination now. Contrary to the majority's assertion, *ante* at 612, the company did not rely wholly on its nonmisrepresentation objections when this case first was argued to this court; the core of its argument was misrepresentation even then, when it principally urged that the Board abused its discretion in adopting the *Shopping Kart* rule (an argument I find unpersuasive, as I stated above, because of the breadth of the Board's power to regulate election procedures). In any case, review of the non-misrepresentation objections is not impossible, even if the earlier briefs were more exhaustive on those issues, because those briefs are available and the facts are unchanged.

Apart from the alleged misrepresentations, the company urges that the election be set aside for three reasons: because of threats that coerced the employees' choice, because of improper union promises of benefits, and because of improper conduct of Board agents in refusing to reopen the polls for absent employees. The Board properly dismissed each of these objections.

A

The company alleges that two threats tainted the election: first, some employees stated that pro-union employees would be discharged if the union lost; second, a burly,

pro-union employee told another employee that if the union won, and there were a strike, and the other employee crossed the picket line, he would kill him. The Board, adopting the finding of the Administrative Law Judge, dismissed the objections because neither statement was attributable to the union, and neither was shown to have been coercive, because the first was a prediction about employer action beyond the union's control, and the second was not so widely circulated as to create a general atmosphere of fear, and was neither implicitly nor explicitly ratified by the union.

The Board properly dismissed these objections because the statements could not be imputed to the union. Threats or promises by third parties are tolerated to a greater degree than threats or promises by the union or employer, *see, e.g., NLRB v. Belcor, Inc.*, 652 F.2d 856, 860 (9th Cir. 1981); *Beaird-Poulan Division, Emerson Electric Co. v. NLRB*, 649 F.2d 589, 594 (8th Cir. 1981); *NLRB v. Hepa Corp.*, 597 F.2d 166, 167 (9th Cir.), *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979); *NLRB v. Urban Telephone Corp.*, 499 F.2d 239, 242 (7th Cir. 1974), and spoil an election only if they create a generally coercive atmosphere that prevents free choice. *See Beaird-Poulan*, 649 F.2d at 594. As I discuss below, the Board properly concluded that no such atmosphere was created here. When a union learns of such misconduct by its adherents and fails to disavow the statements to prevent the appearance of endorsement, the threats or promises may be imputed to it and call for stricter review. *See Urban Telephone*, 499 F.2d at 243. There is no evidence, however, that the union in this case learned of the alleged threats; indeed, the regional director noted that the union's campaign literature advised the employees of the illegality of strike violence. *Mosey Manufacturing Co.*, No. 25-RC-6619, at 5 n. 5. The union thus explicitly disassociated itself from the second category of threats.

Moreover, even if responsibility for the statements that pro-union employees would be discharged if the union lost could be imputed to the union, it was reasonable to consider them noncoercive, because discharge of employees was not within the union's control, nor, I venture to surmise, within its desires. A statement about future events beyond a party's control cannot be considered a threat. *See NLRB v. Bostik Division, USM Corp.*, 517 F. 2d 971, 973 (6th Cir. 1975). Indeed, even if we assume that the union had this power and that it could be known who voted for the union in the secret-ballot election, the only likely consequence of the "threats" would be to encourage opposition to the union to avoid possible discharge.

The company's objection to the threat of strike violence is weak for the same reason. As the regional director noted, *Mosey*, No. 25-RC-6619, at 5, an employee threatened with violence for crossing a hypothetical future picket line has an incentive to vote against the union in order to prevent the possibility of a strike; and in any case because the threat was not conditioned on the employee's vote in the election, the inference that it might have affected the voting is tenuous. For these reasons, the Board's finding that no coercive atmosphere was created is sound.

B

The company further alleges that the union's statement that, if it won the election, it could "guarantee . . . that [the employees'] Local will get as much, if not more, support as American Motors of Richmond did (they ended up with a first year pay increase of around 10%)" was an improper promise of benefit that tainted the election. To the extent that this argument rests on the ground that the wage comparison was erroneous, I have already answered it above in discussing misrepresentations. But to the extent that the argument rests on the ground that promises of benefit are

improper, it borders on the frivolous. The Board often holds that employers' promises of benefit if the union loses or threats of harm if it wins are coercive. *See, e.g., NLRB v. Flomatic Corp.*, 347 F.2d 74, 77 (2d Cir. 1965) (unfair labor practice rather than representation context). The rationale is that, by wielding benefits within its power to grant or withhold, the employer may coerce the employees' choice. *Id.* This rationale has less force when a union's conduct is under scrutiny, because "[a] union can effectively promise only that it will try to gain certain benefits in bargaining sessions. In contrast, an employer appears as one who can fulfill any pledges he makes which seem to be reasonably within his means." *Id.* A union's promise of a particular wage increase would therefore lack credibility; but the union in this case did not even go so far, but merely promised energetic support. Such promises, even when phrased as guarantees, are proper. *See Archer Laundry Co.*, 150 N.L.R.B. 1427, 1435 (1965). *See also NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 279 n. 6, 94 S.Ct. 495, 500, 38 L.Ed.2d 495 (1973) (pre-election union promises or grants of benefits may be coercive only if not across the board to all employees); *id.* at 283, 94 S.Ct. at 502 (White, J., dissenting); *Wilson Athletic Goods Manufacturing Co. v. NLRB*, 164 F.2d 637, 639-40 (7th Cir. 1947). This is particularly true in the context of a heated campaign such as this one, in which the company challenged the union to state what it could guarantee the employees. As one commentator has noted, "[t]he union's promise to improve working conditions, which takes the form of specific goals for wages, fringe benefits, grievance processing and the like, is inherent in every election campaign and is not regarded as unlawful." R. Gorman, *Basic Text on Labor Law* 170 (1976). That such promises may influence votes does not make them coercive; by that standard, all useful information would be banned from campaigns.

C

Finally, the company argues that Board agents acted improperly in refusing to reopen the polls, after the ballots had been tallied, to allow two employees, one of whom was absent from work and the other of whom had fallen sick at work, to vote. It is a long-standing Board policy that a majority of votes cast by a representative group of employees, rather than a majority of eligible voters, is sufficient for certification. *See RCA Manufacturing Co.*, 2 N.L.R.B. 159, 173-78 (1936). Determination of procedures for the conduct of elections is entrusted to the Board's discretion. *See NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330,67 S.Ct. 324, 327-328, 91 L.Ed.2d 322 (1946); *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226, 60 S.Ct. 493, 605-606, 84 L.Ed. 704 (1950). It was hardly an abuse of discretion to adopt the conventional election rule that a majority of actual voters determines the outcome. *See Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 560, 57 S. Ct. 592, 605, 81 L.Ed. 789 (1937) ("Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of these participating in the election .... We see no reason for supposing that [the Railway Labor Act] was intended to adopt a different rule."). This conclusion is not changed by the closeness of the vote, provided that the rule itself is neutral, favoring neither the union nor its opponents. *See NLRB v. A.J. Tower Co.*, 329 U.S. at 334-35, 67 S.Ct. at 329-330. In fact, adherence to the rule is especially warranted in this kind of case, because allowing post-election challenges to the procedures employed would invite delay of certification of election results, an evil to which the Board is sensitive, *see Midland*, 263 N.L.R.B. No. 24, at 15; would invite sabotage of the electoral process; and would invade the privacy of the voters—in particular, in this case, the two voters whose views

the company was eager to include once the other votes had been counted. *See NLRB v. A.J. Tower Co.*, 329 U.S. at 332, 67 S.Ct. at 328-329 (post-election challenge to voter eligibility disallowed because of these dangers). Because the conduct challenged was the neutral application of a reasonable election rule, the company's objection was properly dismissed.

IV

The fourth premise of the majority opinion is that delay between an election and a request to enforce an order to bargain is a sufficient reason to deny enforcement. This view overlooks the well-established principle that for one year following certification of a union, excluding time spent litigating unfair labor practice charges, there is a nearly irrebuttable presumption of continued majority status. *See Brooks v. NLRB*, 348 U.S. 96, 104, 75 S.Ct. 176,181,99 L.Ed. 125 (1954) ("certification year" rule was a proper exercise of the Board's discretion); *NLRB v. John S. Swift Co.*, 302 F.2d 342, 346 (7th Cir. 1962) (excluding "the period during which the bargaining relationship was suspended by litigation of the Company's unfair labor practices"). Although the certification-year rule does not in terms apply to the present case because the issue before the court is whether the certification itself was proper, a clear corollary of the rule is that when certification of a bargaining representative following an election is otherwise proper, delay alone cannot destroy the presumption of continued majority status. *See NLRB v. Mr. B. IGA, Inc.*, 677 F.2d 32, 34 (8th Cir.1982) (per curiam); *NLRB v. Drives, Inc.*, 440 F.2d 354, 366-67 (7th Cir.) (events subsequent to the issuance of bargaining order, such as passage of time and employee turnover, should be disregarded by a court considering enforcement, even though the bargaining order was based on a card majority rather than an election), *cert. denied*, 404

U.S. 912, 92 S.Ct. 229, 30 L.Ed.2d 185 (1971). Otherwise it would always benefit an employer who opposed the union to refuse to bargain, because it would gain not only delay of its duty to bargain with the employees' duly elected representative, as Mosey has in this case, but also the possibility of avoiding the duty to bargain altogether. These are precisely the concerns underlying the Supreme Court's decision in *Brooks,* 348 U.S. at 104, 75 S.Ct. at 181 (Without the certification-year rule, "encouragement would be given to management or a rival union to delay certification by spurious objections to the conduct of an election and thereby diminish the duration of the duty to bargain.").

Moreover, even apart from this rule, I am not convinced by the majority's assertion that enforcement of the bargaining order is inequitable in this case. The changes in Board policy have not prejudiced the employer: the company has achieved its goal of putting off collective bargaining for five and a half years, and its litigation expenses, particularly in light of my conclusion that the election was untainted, have no bearing on its duty to bargain now. The majority's concern that enforcement would be inequitable to the employees because of the staleness of the election have been decisively dismissed by the Supreme Court, whose counsel we are bound to follow:

> Petitioner contends that whenever an employer is presented with evidence that his employees have deserted their certified union, he may forthwith refuse to bargain. In effect, he seeks to vindicate the rights of his employees to select their bargaining representative. If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board. If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indication that his

> claim has merit. . . . The underlying purpose of this statute is industrial peace. To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it. Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

Brooks, 348 U.S. at 103, 75 S.Ct. at 181 (footnotes omitted.)

Finally, even if equity did demand denial of enforcement when delay resulted in the union's loss of majority status, no such showing has been made here. Once an employer recognizes a union, under the certification-year rule majority status is nearly conclusively presumed; after that period the presumption continues but becomes rebuttable. *See NLRB* v. *Burns International Security Services,* 406, U. S. 272, 279 n. 3, 92 S.Ct. 1571, 1578 n. 3, 32 L.Ed.2d. 61 (1972). To rebut this presumption, the employer has the burden of showing by objective evidence either actual loss of majority status or a good-faith doubt about its continuance. *See Orion Corp.* v. *NLRB,* 515 F. 2d 81, 85 (7th Cir. 1975) (per curiam). The passage of time is not sufficient to raise a good-faith doubt. *See NLRB* v. *Katz,* 369 U. S. 736, 748 n. 16, 82 S. Ct. 1107, 1114 n. 16, 82 L. Ed. 2d 230 (1962) ("The company urges that, because of the lapse of time . . . , enforcement should be denied altogether or conditioned on the holding of a new election to determine whether the union is still the employees' choice as a bargaining representative. This argument has no merit."). Nor is high employee turnover sufficient. *See NLRB* v. *Sure-Tan, Inc.,* 583 F. 2d 355, 361 (7th Cir. 1978). In the present case the majority reverses the presumption, assuming that the passage of time and the possibility of turnover (about which we have no

evidence) create a sufficient risk of loss of majority status to make a new election necessary. It is bizarre to entertain contrary presumptions depending on whether an employer has fulfilled its duty to recognize its employee's representative. In a similar case the Eighth Circuit found that "delay and employee turnover are not adequate reasons to set aside a certified election." *NLRB* v. *Mr. B. IGA, Inc.*, 677 F. 2d at 34. In the past, we ourselves have refused to consider delay and turnover in deciding whether to enforce a bargaining order, even when the order was not based on an election. *NLRB* v. *Drives, Inc.*, 440 F. 2d at 366-67. If this court now decides to adopt a contrary rule and to deny enforcement of the bargaining order in this case, it should at least demand that its assumption about the union's loss of majority status has some foundation.

V

I conclude that the Board properly held the election untainted by misrepresentations under any standard; that in any case the Board would now apply a standard under which the majority concedes certification was proper; that the company's other objections to certification, which this court has the capacity to review now, lack merit; and that firmly established labor principles, unchanged by appeals to equity, require enforcement of the Board's order. I therefore dissent.

UNITED STATES COURT OF APPEALS

THIRD CIRCUIT

No. 80-2574.

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

SILVERMAN'S MEN'S WEAR, INC., - - - *Respondent.*

Argued May 19, 1981.
Decided August 6, 1981.
As Amended August 17, 1981.

National Labor Relations Board applied for enforcement of bargaining order issued to employer. The Court of Appeals held that: (1) no hearing was required with respect to two objections raised by employer, and (2) hearing was necessary to ascertain whether remark allegedly made by union officer was actually made and, if it was made, to ascertain the extent to which it infected representation election.

Remanded.

1. Labor Relations Key 177

Valid certification is a prerequisite to the existence of a duty to bargain with an elected union.

2. Labor Relations Key 214

In order to obtain hearing on its objections to conduct affecting outcome of National Labor Relations Board-conducted representation election, objector's proffer of evidence must point to specific events and specific people and

must prima facie warrant setting aside election; evidentiary hearing is not required when, if all evidence proffered by objecting party is accepted as true, no ground is produced which would warrant setting aside election.

3. Labor Relations Key 214

Regional Director of NLRB properly determined that hearing was not required with respect to employer's objections to representation election based upon allegations that union representative misrepresented matter concerning union dues structure and that union engaged in unlawful electioneering, in view of evidence supporting conclusion that employer could have made effective reply to alleged misrepresentation and that alleged acts of electioneering did not violate relevant standard.

4. Labor Relations Key 211, 213

Where union representatives allegedly campaigned in warehouse cafeteria prior to voting, alleged campaigning was not directed to voters in polling area, two union adherents allegedly burst into polling place before polls were open exclaiming that they were going to be observers, and union adherent allegedly stood near line of workers waiting to vote, "staring" at them, telling them when it was their turn to vote, and exchanging pleasantries, alleged activity did not constitute unlawful electioneering.

5. Labor Relations Key 214

Where employer alleged that union secretary treasurer called employer's vice-president a "stingy Jew," hearing was necessary to ascertain whether remark alleged in employer's objection was actually made and, if it was made, to ascertain extent to which it infected representation election.

6. Labor Relations Key 215

Generally, effective appeal to racial or religious prejudice prima facie warrants setting aside an election.

7. Labor Relations Key 214

Where employer alleged that union secretary treasurer called employer's vice-president a "stingy Jew," burden of establishing legitimacy of remark shifted to union.

Howard E. Perlstein, James D. Donathen, (argued), N.L.R.B., Washington, D.C., for petitioner.

William A. Lubbers, Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Robert E. Allen, Acting Associate Gen. Counsel, Elliott Moore, Deputy Assoicate Gen. Counsel, N.L.R.B., Stephen J. Cabot, Barry F. Bevacqua (argued), Pechner, Dorfman, Wolffe, Rounick & Cabot, Philadelphia, Pa., for respondent.

Before ADAMS, ROSENN, and HIGGINBOTHAM, Circuit Judges.

OPINION OF THE COURT

PER CURIAM:

[1] The National Labor Relations Board ("NLRB" or "Board") applies for enforcement of a bargaining order issued to Silverman's Men's Wear, Inc. ("Company" or "Employer"). 29 U.S.C. § 160(e). The order[1] directs the Company to recognize and bargain with General Warehousemen and Employees' Union Local 636 ("Union") as the lawfully certified collective bargaining representative of the Company's employees at its Warrendale, Pennsyl-

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[1]The Decision and Order of the Board on the unfair labor practice charge are reported, *Silverman's Men's Wear, Inc.*, 250 N.L.R.B. 1388 (1980), but the Board's one-page Decision and Certification of Representative, *Silverman's Men's Wear, Inc.*, No. 6-RC-8448 (NLRB Feb. 20, 1980), are not.

vania, warehouse and distribution center. The Company admits refusal to bargain, but defends against the unfair labor practice charge on the ground that the Board's Regional Director should have held a hearing on the Company's objections to the election which led to the Union's certification.[2] Because we believe that one of the objections necessitated a hearing, we deny enforcement.

I.

The bargaining unit at the Company's distribution warehouse in Warrendale consists of 56 employees, 26 of whom were on layoff status at the time of the election. Pursuant to a Stipulation for Certification upon Consent Election, members of the unit voted by secret ballot on May 31, 1979, following approximately two months of campaigning. The Union won, 29 to 23, with two challenged ballots. The employer filed objections to the election, alleging that the Union's conduct in the waning days of the campaign had substantially disrupted the atmosphere of free and fair choice in which elections should be held. Although the Company originally filed five objections, only three have been preserved for our review.

First, the Employer claimed that the Union's Secretary-Treasurer, Robert Baird, significantly misrepresented to approximately 20 employees present at a meeting on May 25, 1979, the wage scales the Union had negotiated for its members at neighboring warehouse and distribution facilities. Second, the Company charged that at the same meeting Baird had infected the election atmosphere with religious prejudice and intolerance when he referred to

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[2]This issue is properly before us because a valid certification is a prerequisite to the existence of a duty to bargain with an elected union. *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251 (1941); *Vitek Elecs., Inc.* v. *NLRB*, 653 F. 2d 785, 787-788 (3d Cir. 1981).

Mark Silverman, a Company vice-president, as a "stingy Jew." Finally, the Employer alleged that Baird and other Union officials had engaged in unlawful electioneering on the day of election.

The Company proffered witnesses in support of its allegations. The Regional Director interviewed these witnesses and, finding the objections to have raised no "substantial and material factual issues," declined to hold a hearing. 29 C.F.R. § 102.69(d) (1980). On the basis of his investigation, he recommended that the Board overrule the objections and certify the results of the election. The Board adopted that recommendation.

After the election was certified, the Union demanded that the Company bargain collectively with it concerning the terms and conditions of employment at the Warrendale facility. The Company refused and an unfair labor practice charge was filed. The Board entered summary judgment for the Union, concluding that all of the Company's claims had been fully litigated and resolved during the representation proceedings. 250 N.L.R.B. 1388 (1980). This application for enforcement followed.

II.

[2] In order to obtain a hearing on its objections to conduct affecting the outcome of a Board-conducted representation election.

> the objector's proffer of evidence must prima facie warrant setting aside the election. The proffer may not be conclusory or vague; it must point to specific events and specific people. On the other hand, an evidentiary hearing is not required when, if all the evidence proffered by the objecting party is accepted as true, no ground is produced which would warrant setting aside the election.

Anchor Inns, Inc. v. *NLRB,* 644 F. 2d 292, 296 (3d Cir. 1981). "[C]ourts will insist on an evidentiary hearing when a party's objection raises substantial and material issues of fact." *Id.* (citing *NLRB* v. *Campbell Products Department,* 623 F. 2d 876, 879 (3d Cir. 1980)). In the instant case, the Regional Director accepted, in support of the Company's objections, statements he obtained during interviews with proffered employees who allegedly witnessed the Union misconduct. As a court we must decide whether this proffered evidence raised substantial and material factual issues, so as to require a hearing. *Vitek Electronics, Inc.* v. *NLRB,* 653 F. 2d 785, 790 (3d Cir. 1981); *NLRB* v. *Sun Drug Co.,* 359 F. 2d 408, 415 (3d Cir. 1966).

With respect to the first objection, alleging material misrepresentations of fact, the Regional Director compared the statements of the Company's "witnesses" with the allegations contained in the objection and concluded that the statements did not support the allegations. As to the second and third objections, unlawful appeals to religious prejudice and Union electioneering at the polls, the Regional Director, assuming the truth of both the statements of the Company-proffered employees and the allegations contained in the objections, concluded that they provided no basis in law for overturning the election.

[3] We have no trouble agreeing with the Regional Director's disposition of the first and third objections. As to the first, the only evidence, as opposed to allegation,[3]

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[3]The Company alleged that Baird stated that the Union had obtained hourly rates of pay of $12 to $17 for workers at two nearby distribution centers. Such a statement, if made, would be untrue, for workers at those centers make considerably less. None of the employees interviewed, however, including those proffered by the Company, remembered such an explicit statement by Baird. Rather, all the employees remembering the mention of wages at $12

(Footnote Continued on Next Page)

indicates merely that the union representative, in explaining the union dues structure, stated that those few union members receiving high rates of pay, $12 to $17 per hour, did not have to pay the normal monthly dues of twice the hourly rate, but instead were charged a reduced amount. Moreover, the statement was made six days prior to the election, giving the Employer ample time to respond.[4]

The Board has held that an election will be set aside "only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply. . . ." *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 224 (1962); *see also General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). Given the evidence proffered, we do not believe the Regional Director erred in concluding that as a matter of law there was no substantial departure from the truth at a time which prevented the Company from making an effective reply. Because this evidence could not satisfy the *Hollywood Ceramics* test, no ground was produced

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(Footnote Continued From Preceding Page)

to $17 hourly rates stated the figures came up only in discussion of union dues computations. It is not contended that there are no union members making those amounts.

[4]The Employer asserts that it did not receive notice of the alleged wage misrepresentation until the morning of May 29. The election began at 3:30 p.m. on May 31. Thus, even though the Board would not allow the Employer to make election speeches on company time during the 24 hours before the election, *Peerless Plywood Co.*, 107 N.L.R.B. 427, 429 (1953), it had all of May 29 and much of May 30 to address employees at work to correct any misrepresentation. Further, although half the workforce was on layoff, the Company could reach those employees by telephone and in fact did talk to eight or nine by that method. Yet the Company never presented any clarification of the alleged wage error, either to the employees at work or to those reached while on layoff.

which would warrant setting aside the election on the first objection, and therefore no hearing was required on that objection. *Anchor Inns, Inc.* v. *NLRB,* 644 F. 2d at 296.

The Company relies principally on *Michem, Inc.,* 170 N.L.R.B. 362 (1968), to support its third objection alleging unlawful electioneering. In *Michem* the Board overturned an election in which a union officer stood beside the line of employees waiting to vote, engaging them in conversation. The Board established a rule against "prolonged conversation between the representatives of any party to the election and voters waiting to cast ballots," based on the premise that "[t]he final minutes before an employee casts his vote should be his own, as free from interference as possible." *Id.* The rule, however, has limitations. First, it applies to "conversations between a party and voters *while* the latter are in a *polling area awaiting* [sic] *to vote.*" *Id.* at 363 (emphasis added). *Accord, Harold W. Moore,* 173 N.L.R.B. 1258 (1968) (rule applies only to conversations with voters "in the polling area or in line waiting to vote"). Second, the rule "does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.'" 170 N.L.R.B. at 363.

[4] The incidents which the Employer alleges constituted unlawful electioneering do not fall with the *Michem* prohibition. The Company charges first that Baird and another union representative campaigned among employees waiting for the commencement of the election, but the alleged campaigning took place in the warehouse cafeteria prior to the voting, not the recreation room where the polls were located. Because the campaigning was not directed to voters in the polling area, this alleged incident does not violate *Michem.* The second charge is that "a minute or two before the polls were to open, two union adherents

burst into the polling place exclaiming 'we are going to be observers in the election, Mr. Baird, is that okay?'" This is precisely the "chance, isolated, innocuous comment" *Michem* excepts from its rule against conversations. There is no indication here of last minute campaigning. The third incident alleged by the Company is that a union adherent stood near the line of workers waiting to vote, "staring" at them and telling them when it was their turn to vote. The only evidence of conversation by this "staring" employee was the exchange of pleasantries. Although, as *Michem* counsels, parties to elections might be wise to refrain entirely from conversing with prospective voters, *id.*, we conclude that this third incident also was a trifle not reached by the *Michem* rule.[5] In sum, we agree with the Regional Director that the evidence proffered in support of the third objection would not under *Michem* warrant setting aside the election, and so no hearing was required on this objection either. *Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d at 296.

III.

[5] We cannot accept, however, the Regional Director's conclusion that no hearing is necessary on the second objection. The Company alleged that at the May 25, 1979, meeting attended by approximately 20 employees Union Secretary-Treasurer Robert Baird called Company Vice-President Mark Silverman a "stingy Jew." The Regional Director assumed the truth of this allegation, but concluded that "it does not afford a sufficient basis for setting aside

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[5]The Company did not allege in the Board proceeding that the employee was a union agent. In concluding that this incident could not as a matter of law violate *Michem*, we find it unnecessary, as the Board also did, to determine whether the adherent, as a member of the Union's in-plant organizing committee, was a union agent. See generally *Season-All Indus., Inc.* v. *NLRB*, 654 F. 2d 932 (3d Cir. 1981).

an election." For that reason the Regional Director refused to hold a hearing on the objection. The refusal was improper.

In *Sewell Manufacturing Co.*, 138 N.L.R.B. 66 (1962), the Board set aside an election which the union had lost 985-331 because the employer appealed to anti-black racial prejudice in its campaign literature.[6] The employer had sent to employees a number of photographs and newspaper clippings purporting to demonstrate the friendliness of union leaders to blacks and the support the union had given to several civil rights groups. By such a linkage, the employer could exploit any anti-black animus and convert it to anti-union sentiment to defeat the organizational effort. The Board in *Sewell* took a position by which it clearly sought to prevent such tactics. "The Board does not intend to tolerate as 'electoral propaganda' appeals or arguments which can have no purpose except to influence the racial feelings of voters in the election." *Id.* at 71. This view is reflected in the test announced by the Board in *Sewell*:

> So long . . . as a party limits itself to *truthfully* setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making use of a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

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[6]A second election, which the union lost 931-345, was subsequently set aside because the employer continued the improper campaign tactics. *Sewell Mfg. Co.*, 140 N.L.R.B. 220 (1962).

Id. at 71-72 (emphasis in original) (footnote omitted). This rule was intended to be consistent with and in furtherance of the Board's function

> to conduct elections in which the employees have the opportunity to cast their ballots for or against a labor organization in an atmosphere conducive to the sober and informed exercise of the franchise, free not only from interference, restraint, or coercion violative of the Act, but also from other elements which prevent or impede a reasoned choice.

Id. at 70.

[6, 7] The Board contends that the evidence proffered here was insufficient under *Sewell* to warrant setting aside this election. We disagree. The general rule to be derived from *Sewell,* and the one that we apply, is that an effective appeal to racial or religious prejudice prima facie warrants setting aside an election. The facts of this case disclose an utterance that falls well within the proscription of that general rule. In making a remark such as the one involved here, a party does not simply set forth another party's position on matters of racial interest. Indeed, the remark, rather than identifying any position of the Employer, can typically serve only to spotlight the minority religion of the Company's principal. Such a remark has no purpose except blatantly to exploit religious prejudices of the voters. It deliberately injects "an element which is destructive of the very purpose of an election." *Id.* at 71. There is no question of truth or falsity in a slur such as this. We can see no reason for the remark except to inflame and incite religious or racial tensions. Thus, the Company has alleged a remark that falls within the *Sewell* definition and, under the rule of that case, the burden of establishing the legitimacy of the remark shifted to the Union. Without a hearing, however, the Union was never required to meet

that burden; furthermore, it was a burden that the Union clearly could not have met.[7]

On the other hand, it is not clear whether the Union could have met the separate burden of proving that Baird's remark, although nothing but a slur, was nevertheless harmless. However, in concluding that the objection was meritless prior to an evidentiary hearing, the Regional Director effectively deprived the Company of its right to a considered determination on that issue. *Cf. NLRB* v. *Staiman Brothers*, 466 F. 2d 564, 567 (3d Cir. 1972). In his report certifying the election results, the Regional Director explained that Baird's remark was, in his view, "[a] single, casual reference to a party's religious or ethnic background in a campaign otherwise free of racial hostility." In the Regional Director's view, *Sewell*, as modified by *Paula Shoe Co.*, 121 N.L.R.B. 673 (1958), stands for the proposition that "*only* a deliberate and sustained appeal to racial prejudice which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory [*sic*] appeals affords a sufficient basis for setting aside a Board election." (Emphasis added.) The Board, pursuing this line of reasoning, argues that the incident was isolated, and therefore did not require a hearing. We cannot add our voice to this chorus. As a matter of *stare decisis*, it misstates *Sewell*. As a mat-

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[7]In a post hoc effort to rationalize the Regional Director's report on a ground not mentioned in that report, the Board in its brief and at argument on this appeal contended that the slur was "marginally germane." Apparently the Board's counsel was attempting to justify Baird's remark for purposes of meeting the second part of the *Sewell* test. However, we can reject that effort on grounds, *inter alia*, of its own lack of merit. If the Union leader had desired to stress the executive's parsimony, he could have referred to "stingy Silverman" or the "stingy vice-president." Instead, he allegedly resorted to a disreputable stratagem of bigots. The man's religion was not germane to the proper purposes of this election effort.

ter of policy, it is similarly flawed. The remark may not have been repeated, but because of its sensitive nature we hold that the Regional Director could determine the extent of its propable impact on the election only after a hearing.[8]

In *Paula Shoe Co.*, the Board, without a prior hearing, rejected an objection to an election based on the union's inclusion in a handbill of a slur similar in character to the one now before us. Frankly, we find such a conclusion, reached without benefit of a hearing to determine the circumstances and likely impact of such a statement, to be inconsistent with the Board's professed position that "it does not condone appeals to prejudice," 121 N.L.R.B. at 676, and we reject it as an anomaly.[9] We note further that *Paula*

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[8]We need not now speculate whether there could ever be a blatant ethnic slur, having no other purpose or possible effect than to invoke irrelevant prejudices, that could properly be treated by the Board as if it had never occurred. For it may be possible that there could be a set of circumstances in which such a remark might be said, even absent an evidentiary hearing, to have had absolutely no effect on the outcome of the election. However, this was not a case in which the slur was so obviously devoid of impact as to be rejected out of hand.

[9]Apparently, other Regional Directors no longer follow *Paula Shoe*. In two recent cases Regional Directors have scheduled hearings to review what seem to us incidents potentially less damaging to free choice than that alleged here. In *American Enka Co.*, 231 N.L.R.B. 1335, 1342 (1977), a hearing was held on an objection alleging three black union adherents had told another black worker at her home that she had been promoted so she would become a "white folks' nigger." In *Coca-Cola Bottling Co. Consol.*, 232 N.L.R.B. 717, 717-18, 720 (1977), a hearing was held on the allegation that a supervisor told four black employees that the man who would be their shop steward if the union won did not like blacks. In the present case, on the other hand, the slur was allegedly stated in front of twenty employees and the election might have come out differently if only three votes were altered.

(Footnote Continued on Next Page)

Shoe, the only case cited by the Board in which such a result was reached without benefit of a hearing, was decided before *Sewell*.

When is it recognized that *Sewell* stripped the earlier result in *Paula Shoe* of any possible rationale, it becomes clear that the existing cases do not insulate Baird's remarks, as a matter of law, from attack. To the contrary, they state a standard for legitimacy that the Union is clearly unable to meet.[16] Moreover, the allegations in the Company's objection raised a prima facie case that Baird's religious slur did impermissibly infringe on the employee's

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Although in neither *American Enka* nor *Coca-Cola* were the election results ultimately set aside on these grounds, the hearings served two important functions. First, they provided the essential facts on the alleged improper conduct and its impact. Second, they indicated clearly to parties to elections that the Board will back up with action, not just tongue clicking, its position that it does not condone appeals to racial prejudice.

[16]*See* note 7 *supra*. In addition to *Paula Shoe*, the Board on this appeal cited several other cases purporting to support the proposition that this single remark was insufficient as a matter of law to warrant setting aside an election. Although those cases are undoubtedly viable in other factual contexts, they are inapposite here. For example, in *Peerless of America, Inc.* v. *NLRB*, 576 F. 2d 119, 125 (7th Cir. 1978), the union had charged the employer with past discrimination against workers on the basis of sex and nationality. Such a charge, concerning a legitimate and germane issue of importance to workers, is wholly different in character from the bald, bigoted slur alleged in this case. Similarly, in *NLRB* v. *Bancroft Mfg. Co.*, 516 F. 2d 436, 440-44 (5th Cir. 1975), *cert. denied*, 424 U. S. 914, 96 S. Ct. 1112, 47 L. Ed. 2d 318 (1976), the union appeals to black pride that were found not to violate either the *Sewell or Hollywood Ceramics* rules, were different in character than the directly abusive remark alleged here. Moreover, in *Bancroft* a hearing had been held to determine the specifics and impact of the allegedly offensive conduct.

freedom of choice. Twenty employees were present when the slur was allegedly made. If three were influenced in their votes by this improper remark, the outcome of the 29-23 election could have been altered. In addition, the Employer was powerless to answer a remark of this type in the way that it could have answered the alleged misrepresentation of wages. To respond to such a racial remark would only draw attention to it and perhaps fuel any bigotry inflamed by the Union leader's appeal. Because the Union resorted to religious prejudice in a manner that may have affected a significant number of employees and that precluded an effective response by the offended party, a new election may be required.[11]

We conclude that under the law announced in *Sewell*, the Company's allegations, if true, would warrant a new election, assuming that the totality of circumstances surrounding Baird's remarks evinced an atmosphere in which those remarks may reasonably be expected to have had a significant impact on the employees' free exercise of choice.

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[11]We note that due to the presence of these circumstances, the probable impact of Baird's remark may well have been sufficient to warrant setting aside the election under the standard announced in *Hollywood Ceramics Co.*, 140 N.L.R.B. 221 (1962), and subsequently revived and reinstated in *General Knit of California, Inc.*, 239 N.L.R.B. 619 (1978). That the objectionable conduct was a racial slur, not a misrepresentation, does not make the *Hollywood Ceramics* rule inapplicable. Both can deprive employees of the "full and complete freedom of choice in selecting a bargaining representative," *Hollywood Ceramics Co.*, 140 N.L.R.B. at 223, and can destroy the "laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). The Board's General Counsel recognized the relevance of the rule by arguing in the Board's brief that the remark did not meet the *Hollywood Ceramics* standard.

These factors should properly be explored at a hearing, because they constitute substantial and material factual issues necessarily arising out of the allegations made in the Company's objection. *See Anchor Inns, Inc.* v. *NLRB*, 644 F. 2d at 296. Having received the Company's allegations, it was only through a hearing that the Regional Director could determine that such circumstances were *not* present, for only through a hearing could the union have borne its burden of proving that the utterance was harmless. Such a course—followed already by at least some Regional Directors—is necessary if elections are to be kept free, as they should be, from appeals to racial or religious prejudice.

IV.

On the alleged facts, we hold that a hearing was necessary to ascertain whether the remark alleged in the second objection was made, and, if made, the extent to which it infected the election. Accordingly, enforcement will be denied and the proceedings remanded to the Board for a hearing on this objection only.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 79-2733

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

SOUTH MISSISSIPPI ELECTRIC POWER ASSOCIATION, - - - - - - *Respondent.*

Summary Calendar.*

May 8, 1980.

NLRB sought enforcement of its order against employer finding that it violated National Labor Relations Act by its failure to bargain with recently certified union. The Court of Appeals, Tate, Circuit Judge, held that: (1) NLRB conclusion that alleged conduct of union observer in maintaining eligibility list of voters during certification election did not vitiate fairness of election was supported by substantial evidence, and (2) employer was not denied due process by NLRB's failure to conduct evidentiary hearing on objections to union certification election.

Enforcement granted.

1. Labor Relations Key 667

Since an employer cannot be held in violation of National Labor Relations Act for refusal to bargain with incorrectly certified employee representative, unfair labor

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

practice proceeding for employer's refusal to bargain with recently certified union subjects certification of union to judicial review. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

2. Labor Relations Key 703

Enforcement of an NLRB order finding that employer unlawfully refused to bargain with recently certified union is to be granted if NLRB decision to certify was reasonable and based on substantial evidence. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

3. Labor Relations Key 539

Employer bears burden of proving that union certification election should be set aside. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

4. Labor Relations Key 214

NLRB conclusion that alleged conduct of union observer in maintaining eligibility list of voters during certification election did not vitiate fairness of election was supported by substantial evidence. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

5. Labor Relations Key 214

Neither Constitution nor Congress grants a right to a full evidentiary hearing in union election challenges. National Labor Relations Act, § 8(a)(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5).

6. Constitutional Law Key 275(5)
Labor Relations Key 214

Employer was not denied due process by NLRB's failure to conduct evidentiary hearing on objections to union certification election. National Labor Relations Act, § 8(a)

(1, 5) as amended 29 U.S.C.A. § 158(a)(1, 5); App. 29 U.S.C.A. Rules & Regulations, § 102.69(d).

Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., for petitioner.

Jolly, Miller & Milam, Kenneth E. Milam, James R. Lockard, Jackson, Miss., for respondent.

Application for Enforcement of an Order of the National Labor Relations Board.

Before Roney, Kravitch and Tate, Circuit Judges.

Tate, Circuit Judge:

The National Labor Relations Board seeks enforcement of its March 26, 1979[1] order against South Mississippi Electric Power Association (the company) finding that employer in violation of Section 8(a)(5) and (1) of the National Labor Relations Act by its refusal to bargain with the recently certified union.[2] The company's defense in the unfair labor practice proceeding and its only argument before this court is that the union was improperly certified, or, at the very least, that the company was denied due process in the Board's failure to conduct an evidentiary hearing on the company's objections to the union's election. Because we now find that the Board's certification of the union and its refusal of an evidentiary hearing were reasonable and based on factfindings supported by substantial evidence, we grant enforcement of the Board's order.

The International Brotherhood of Electrical Workers, Local 903, AFL-CIO, was certified by the Acting Regional

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[1]The Board's order, which is reported at 241 NLRB No. 51, requires the company to cease and desist from its unlawful conduct, to bargain with the union upon request and to post an appropriate notice.

[2]The International Brotherhood of Electrical Workers, Local 903, AFL-CIO.

Director of the National Labor Relations Board in a supplemental decision addressing company objections to the election proceedings on September 28, 1978. This decision became final with the Board's denial of the company's request for review on November 20, 1978. The company subsequently refused to bargain with the union, thereby provoking an unfair labor practice complaint, which it defended with renewed objections to the election and certification of the union. The Board granted summary judgment in favor of the union and applied to this court for enforcement of its order.

[1-3] Since an employer cannot be held in violation of the Act for a refusal to bargain with an incorrectly certified employee representative, this proceeding, as is often the case, subjects the certification of the union to judicial review. *N.L.R.B.* v. *Allis Chalmers Corp.*, 601 F. 2d 870 (5th Cir. 1979). Our consideration must conform to a firmly-established standard of review: the enforcement is to be granted if the Board decision to certify was reasonable and based on substantial evidence. The employer bears the burden of proving that the election should be set aside. *Id.*

In its original challenge to the union's conduct with respect to the election, the company raised two objections. In its opposition to enforcement of the Board order, however, the company reduces its complaint to the single allegation that the union observer maintained an eligibility list of voters and thus destroyed the "laboratory conditions" which the Board deems necessary to a free and fair election. The sworn statements by the union observer, the company observer, and one other employee were considered and discussed in detail by the Acting Regional Director. These established that the union observer had an employee voting list and that he may have briefly compared his list to the official list of those who had voted once during morning

balloting and once during afternoon balloting. The two observers' statements disagree as to whether marks on the controversial list were made the night before (in anticipation of challenging certain voters) or during the voting period. The list was generally kept face down on a table or in the union observer's pocket.

[4] The Acting Regional Director found it unnecessary to make a credibility determination and assumed *without finding* that the statements of the company's affiant accurately portrayed the union observer's conduct. He nevertheless did not find the fairness of the election to be vitiated because, even crediting fully the statements on behalf of the company, (1) the union observer could have recorded only a small number of those who had voted and (2) this occurred during a period of time when no eligible voters were in the voting area. These conclusions are supported by substantial evidence, including the statements offered by the challenger to the election. The legal conclusion that under these circumstances, any list kept by the union observer, even an eligibility list disapproved under *International Stamping Co., Inc.*, 97 N.L.R.B. 921 (1951), would not create a coercive atmosphere tainting the fairness of the election is a reasonable one and is supported by *A. D. Julliard and Co.*, 110 NLRB 2197 (1954). *See also Robert's Tours, Inc.* v. *N.L.R.B.*, 578 F. 2d 242 (9th Cir. 1978).

[5, 6] The company's complaint with respect to denial of an evidentiary hearing in its election challenge is equally lacking in merit. Neither the Constitution nor Congress grant a right to a full evidentiary hearing in union election challenges, *N.L.R.B.* v. *Dobbs House, Inc.*, 613 F. 2d 1254, 1256 (5th Cir. 1980), *N.L.R.B.* v. *Golden Age Beverage Co.*, 415 F. 2d 26 (5th Cir. 1969), and the company does not contend otherwise. The Board, by way of its promulgated regulations has authorized the Regional Director to permit such a hearing, "if it appears to [him] that substantial and

material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing." 29 C.F.R. § 102.69(d). Although the Acting Regional Director chose to leave certain factual issues unresolved, these were not substantial and material and therefore did not merit a hearing. Even conceding arguendo the resolution of these issues urged by the company, the company still fails to satisfy the burden of proving that, under applicable legal standards, the election should be overturned.[3] *Cf. Gulf Coast Automotive*

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[3]The company in opposing enforcement of the Board order in this court, devotes its entire brief to discussion of a 1974 N.L.R.B. decision, *Marathon LeTourneau Company*, 208 N.L.R.B. 213. Neither the decision nor the argument flowing from it was even indirectly presented to the N.L.R.B. or its Regional Director in the prior proceedings on the company's election challenge and the union's unfair labor practice complaint.

In *Marathon LeTourneau* the union challenged a company-sponsored raffle in which employees had the opportunity to sign for a drawing of a color television set as they left the balloting place after voting. Only employees who voted were eligible to participate in the raffle. The employees who chose to do so were asked to identify themselves and confirm that they had voted; their names were then checked off of a voter eligibility list. The Administrative Law Judge, in findings and conclusions adopted by the Board, observed that "by restricting eligibility to participate in the raffle to only those employees who voted in the election, the employer was in a position to know who had not voted. . . . [H]ere, the situation was even more aggravated—this list was available for several hours before the second voting period [of a split election schedule] started . . . I find that by maintaining a list whereby it could keep an account of employees who had not yet voted, the employer engaged in conduct which constituted a sufficient invasion of the laboratory conditions which the board so zealously demands in board elections." 208 NLRB at 224.

The company argues that this decision established a policy whereby the keeping of any eligibility list in an election with a

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Warehouse Co., Inc. v. *N.L.R.B.*, 588 F. 2d 1096 (5th Cir. 1979), where this burden was met.

ENFORCEMENT OF ORDER GRANTED.

(Footnote Continued From Preceding Page)

split balloting period invalidates the election, whether or not the employees were aware of the list, because regardless of whether it is actually so used, it presents the opportunity for coercion of the employees who have not yet voted. Regardless of any policy possibly announced in *Marathon LeTourneau*, however, we find the case inapposite to the facts at hand. While the Regional Director declined to resolve credibility differences, he did find, on the basis of uncontroverted statements that only a small number of voters could have been recorded by the union observer. In this context, no practical opportunity for coercion is presented. Because the observer could have recorded only a fraction of those who had voted, the union was not "in a position to know who had not voted."

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

No. 83-5058.

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

STATE PLATING & FINISHING COMPANY, - - *Respondent.*

Argued February 21, 1984.
Decided July 3, 1984.

National Labor Relations Board sought enforcement of its order directing company to bargain with union. Company had refused to bargain in order to contest election which resulted in certification of union. The Court of Appeals, Cornelia G. Kennedy, Circuit Judge, held that Board's neutrality was destroyed by NLRB agent's comment on a local issue which misled employees into believing that their employer had lied to them, with Board's finding to the contrary not supported by substantial evidence, and thus, as election was tainted by this failure of Board's neutrality, the union was improperly certified.

Application for enforcement denied.

1. Labor Relations Key 680

Abuse of discretion standard was not appropriate for review of findings of the National Labor Relations Board concerning impairment of Board neutrality and NLRB agent's alleged misrepresentation of the law, in that NLRB findings could not be characterized as establishing and re-

fining rules governing representation elections nor did Board's finding that agent did not misrepresent law establish or refine any election rules; instead, substantial evidence standard was applicable to review Board's findings.

2. Labor Relations Key 215

National Labor Relations Board agent's conduct that tends to impair Board's neutrality is sufficient ground for setting aside an election.

3. Labor Relations Key 211

Comment by National Labor Relations Board representative on local issue in a campaign before election impairs appearance of Board neutrality and is ground for setting aside an election.

4. Labor Relations Key 214

National Labor Relations Board's finding that NLRB agent had not answered a question regarding local issues in a campaign, so as to impair Board's neutrality sufficiently to set aside election, because agent was confronted with a general question to which he gave a general statement of law was not supported by the record.

5. Labor Relations Key 215

Appearance of a compromise of National Labor Relations Board neutrality will warrant setting aside an election even if Board in fact remains neutral.

6. Labor Relations Key 214

National Labor Relations Board's finding that its neutrality was not impaired by comment of Board's agent on a local issue was not supported by substantial evidence, in view of undisputed evidence establishing that employees considered Board to have endorsed, four days before election, the union's position on a local issue of great concern to them.

7. Labor Relations Key 393

Granting benefits to employees before an election constitutes an unfair labor practice if motivated by a desire to induce votes against a union; no conditions or threats need be attached to benefits to establish such motivation.

8. Labor Relations Key 214

If raises are granted after election petition is filed and before the election, the National Labor Relations Board presumes the employer acted with an illegal motive; burden then shifts to the employer to justify both the fact and the timing of the increase.

9. Labor Relations Key 211

Company vice-president's statement that company could not award raises during election campaign period appeared to be correct, in view of company's history of wage increases and fact that no decision on raises had in fact been made, and conclusion of employees that company had lied to them understandably reached from comments of National Labor Relations Board agent concerning wage increases was wrong, and thus effect of agent's statement was to misrepresent the law to the employees.

10. Labor Relations Key 211

National Labor Relations Board's neutrality was destroyed by NLRB agent's comment on local issue which misled employees into believing that their employer had lied to them, and thus, as election was tainted by this failure of Board neutrality, union was improperly certified.

Elliott Moore, Deputy Associate Gen. Counsel, Ellen Farrell (argued), N.L.R.B., Washington, D.C., for petitioner.

Peter J. Kok (argued), Grand Rapids, Mich., for respondent.

Before KENNEDY and WELLFORD, Circuit Judges, and COOK, District Judge.*

CORNELIA G. KENNEDY, Circuit Judge.

The National Labor Relations Board ("NLRB" or "Board") seeks enforcement of its order directing State Plating & Finishing Company ("State Plating") to bargain with Local 406 of the Teamsters Union.[1] State Plating has refused to bargain in order to contest the election which resulted in certification of the union. State Plating contends that the election must be set aside because during the election campaign a union representative and a NLRB agent falsely led the employees to believe that their employer had lied to them about its inability to grant raises before the election. We agree with the employer that the NLRB agent's statements compromised the Board's neutrality and deny enforcement.

I

On September 16, 1980, the union filed a petition for a representation election with the NLRB, and an election was scheduled for November 14, 1980. After the election had been scheduled William Waring, the vice-president of State Plating, was asked by certain employees why they were not receiving raises. Waring replied that under the NLRB's rule he could not give out any raises from the time the union demanded recognition until the election, because if he did it would appear as though he were trying to influence votes. Waring gave this response to several individual employees and groups of employees. In fact State Plating had not announced nor had it scheduled or decided

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*Honorable Julian A. Cook, Jr., United States District Court for the Eastern District of Michigan, sitting by designation.

[1]The Board's decision is reported at 262 N.L.R.B. No. 16, 110 L.R.R.M. 1264 (1982).

upon any pay raises before the union's petition for certification was filed. It was the company's practice to give individual employees five-cent, ten-cent, fifteen-cent, or twenty-cent an hour raises at various times. Sometimes an employee would receive raises in successive months. The company had given all its employees a ten-cent an hour raise in February 1980. A number of employees had received individual raises after that date; two of them in August shortly before the petition was filed. All employees had been given some wage increase in the fall of 1979. Some received a ten-cent increase in September and another ten cents in October. One received fifteen cents in September and twenty cents in October. One received ten cents in September and ten cents in November. Others received only one increase of five cents, ten cents, or fifteen cents in October. Most, but not all, employees had received some raise at various dates and in varying amounts in the fall of 1978.

The employees brought their concern over the moratorium on raises to union business agent John Winkle. Winkle told the employees that the union had no objection to regularly scheduled pay raises and that the employer could give them if it wanted to. The employees expressed a desire to verify that their employer could indeed grant raises by obtaining an opinion from the NLRB.

Four days before the election, twelve employees met at Winkle's office.[2] Winkle placed a call to the NLRB on his speaker phone and reached a NLRB field examiner, Joan Wesa. Wesa had no connection with the State Plating case,

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[2]Three days earlier Winkle had given the NLRB's phone number to Christine Jones, an employee, so that the NLRB could answer her questions and those of other employees. Jones lost the phone number. When Winkle learned that the employees contemplated calling from Jones' home, he offered them the use of the union office and its speaker phone for the call.

but had dealt with Winkle regarding another case. Wesa testified that Winkle told her that some employees had some questions regarding a scheduled election, and that an employee then began asking questions. The employee, Christine Jones, first asked Wesa whether the NLRB was in alliance with the union. Wesa replied that the NLRB was impartial.

Jones then asked Wesa whether her employer could continue giving regularly scheduled raises despite a pending election. No witness was able to relate the exact language used by Wesa in reply. Wesa testified that she told the employees that she didn't like to give such information over the telephone, but that "it was possible for an employer to give a pay raise even though an election is coming." Transcript at 91. Wesa's handwritten notes made during the conversation indicate that her answer was "normally yes—that if they're already due—they should receive them as if there were no election coming." A number of employees testified Wesa had said that they could receive "regular" raises. Wesa was not told and did not ask about State Plating's prior history of granting wage increases or whether any raises had been announced or actually scheduled by the employer.

The conversation with Wesa was widely discussed among all the employees and led many of them to believe that Waring had lied to them about his ability to grant raises. The employees confronted Waring with their belief that he had lied, and would not listen to Waring's attempts to explain his position. The NLRB rejected Waring's request that it further clarify the law regarding wage increases. The union won the election by a vote of sixteen to eleven.

State Plating filed objections to the election, and a hearing on the objections was held before a NLRB Hearing Officer. The Hearing Officer recommended that the objec-

tions be overruled. The NLRB adopted the Hearing Officer's report and recommendations, and certified the union. State Plating refused to bargain with the union, and the NLRB now petitions for enforcement of its order requiring State Plating to bargain.

State Plating argues that the certification was improper for three reasons: (1) Wesa's misleading statement regarding a local issue destroyed NLRB neutrality; (2) Winkle abused NLRB processes by implying that the NLRB supported the union's claim that Waring was lying; and (3) Winkle's assertion that State Plating could not give out raises constituted a material misrepresentation. We need reach only the first of these arguments.

The NLRB in its certification order adopted the Hearing Officer's findings, which thus are the findings of the NLRB. The Hearing Officer found that the effect of Wesa's conversation with the employees on the election should be evaluated according to the following standard: "The agent's agreement to answer a question or the actual answer given must neither compromise Board neutrality nor constitute a material misrepresentation of law within the standard of *General Knit* . . . or the agent's conduct may be deemed objectionable interference with a NLRB election." The Hearing Officer further found that the issue of the NLRB's neutrality depended on whether Wesa's "response to a question concerning employee pay increases . . . indicated support of any particular party." The Hearing Officer concluded that it did not, because: "Wesa was confronted with a general question, to which the record indicates she gave a general statement of law, not wedded to any factual position." The Hearing Officer also found that Wesa's response was an accurate general statement of the law and not a material misrepresentation.

Resolution of this case depends on whether these findings are supportable under the applicable standard of review.

II

29 U.S.C. § 160(e) provides: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *See also Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (substantial evidence test applied to review of NLRB action; standard of review same as under Administrative Procedure Act). The NLRB, however, argues that the substantial evidence test is not the appropriate standard of review in this case. While admitting that factual findings are reviewable under the substantial evidence test, the NLRB argues that the application of its rules to particular facts is the means through which the Board concretely defines the limits of its election policies. The NLRB argues that application of election rules to particular facts therefore should always be reviewed on the basis of whether the Board's election policy, as thus defined, constitutes an abuse of the Board's broad discretion in conducting elections and resolving representation matters. *See NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 67 S. Ct. 324, 91 L. Ed. 322 (1946); *NLRB* v. *Wackenhut Corp.*, 471 F. 2d 761 (6th Cir. 1972).

This argument was recently rejected by the Seventh Circuit, sitting en banc, in *Mosey Manufacturing Co.* v. *NLRB*, 701 F. 2d 610 (7th Cir. 1983). In *Mosey*, the court held that "the proper standard of judicial review in cases involving the [NLRB's] application of its election rules to particular facts" was substantial evidence on the record as a whole. 701 F. 2d at 611, 615. In rejecting the abuse of discretion standard, the court emphasized "the difference between discretion in formulating rules and discretion in applying them to facts," 701 F. 2d at 615, and held that:

> the abuse of discretion standard . . . is meant for the review of decisions that have one or more of the follow-

> ing characteristics: the factors that are supposed to dominate the decision cannot be evaluated by the reviewing court; the decision is supposed to be made on the basis of subjective rather than objective factors—the individual judgment of the judge or administrator, rather than some articulable legal standard; uniformity of decisions is not important.

701 F. 2d at 615. The same conclusion was reached by the Third Circuit in *Jamesway Corp.* v. *NLRB*, 676 F. 2d 63 (3d Cir. 1982). The *Jamesway* court held that:

> there is no indication that the court [in *NLRB* v. *A. J. Tower*, 329 U. S. 324, 67 S. Ct. 324, 91 L. Ed. 322 (1946)] intended to displace the substantial evidence standard of review which under 29 U.S.C. § 160(e) & (f) is to be applied by courts of appeals to the Board's findings of fact. Thus, *A. J. Tower Co.* accords the NLRB wide discretion in formulating election procedures; it does not thereby limit court of appeals review of Board determinations concerning election conduct to the more restrictive abuse of discretion standard.

676 F. 2d at 67.

We agree with these decisions at least to the extent that in deciding which standard to apply they look to whether the Board action under review represents the establishment or refinement of a rule governing elections, or whether it is the application of a rule to particular facts. Exercise by the Board of its rulemaking discretion to establish "the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees," *A. J. Tower Co.*, 329 U. S. at 330, 67 S. Ct. at 327, normally involves evaluation by the Board of various subjective policy concerns. Review under a substantial evidence standard of the application of a rule to particular facts,

which does not involve evaluation of policy concerns, will not subject courts to "the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy," *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 194, 61 S. Ct. 845, 852, 85 L. Ed. 1271 (1941).

The NLRB findings under review in the present case cannot be characterized as establishing and refining rules governing representation elections. The Board's finding (through its Hearing Officer) that the Board's neutrality was not impaired by NLRB agent Wesa's conversation with the employees is based on its finding that Wesa merely gave a general statement of law in response to a general question, and did not comment on a local issue . In making this finding, the NLRB did not weigh policy considerations and conclude that the election should not be set aside despite the agent's comment regarding a local issue. Instead, the Hearing Officer's report can be fairly read as implying that the election would have been set aside if the agent's answers had been more than a general statement in response to a general question. No other rule may be gleaned from the Hearing Officer's report, which was adopted by the NLRB.

Similarly, the Board's finding that agent Wesa did not misrepresent the law does not establish or refine any election rule. The Hearing Officer's report stated that "when the Board in a pre-election context materially misstates the underlying law . . . its conduct may be deemed objectionable." It is only whether this rule has been violated, not the rule itself, that is challenged in the present case. The Board's conclusion that Wesa had not materially misrepresented the law did not derive from the Board's judgment that, although a misrepresentation was made, it was not of

sufficient import to warrant setting aside the election.[3] Instead, the Board rested its conclusion on two findings, neither of which required it to exercise its discretion: (1) that Wesa had given a general statement of the law and not a comment on a local issue; and (2) that Wesa's comments were "in fact an accurate representation of Board law."

[1] The abuse of discretion standard is therefore not appropriate for review of the Board's findings here concerning impairment of Board neutrality and Wesa's alleged misrepresentation of law.[4]

We thus turn to the question of whether the Board's findings are supported by substantial evidence on the record considered as a whole.

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[3]*Midland National Life Ins. Co.*, 263 N.L.R.B. No. 24, 110 L.R.R.M. 1489 (1982), where the Board most recently changed its standards for determining when campaign misrepresentations warrant setting aside an election, is an example of a case where the Board did make such a policy judgment. Review of the validity of those standards would be subject to the abuse of discretion standard. *See Van Dorn Plastic Machinery Co.* v. *NLRB*, 736 F. 2d 343 (6th Cir. 1984).

[4]Application of the substantial evidence test to a finding concerning the Board agent's misrepresentation is not inconsistent with cases in this Circuit concerning misrepresentations by parties in election campaigns. In *Harlan # 4 Coal Co.* v. *NLRB*, 490 F. 2d 117 (6th Cir.), *cert. denied*, 416 U. S. 986, 94 S. Ct. 2390, 40 L. Ed. 2d 763 (1974), this Court reviewed the Board's finding that a union had not made material misrepresentations on a substantial evidence standard. In *NLRB* v. *Holland American Wafer Co.*, 683 F. 2d 135 (6th Cir. 1982), this Court used an abuse of discretion standard, but only to evaluate the test used by the Board to measure the substantiality of misrepresentations. And in *NLRB* v. *Pinkerton's, Inc.*, 621 F. 2d 1322 (6th Cir. 1980), and *NLRB* v. *Dean Foods Co.*, 421 F. 2d 664 (6th Cir.), *cert. denied*, 398 U. S. 939, 90 S. Ct. 1843, 26 L. Ed. 2d 271 (1970), this Court framed the issue in terms of whether the Board abused its discretion, but actually evaluated specific findings under a substantial evidence standard.

III

State Plating asserts that the election was unfair because the NLRB destroyed its neutrality by giving the employees an opinion on a local issue that was important to the election's outcome. We agree.

[2] It is well-settled NLRB law that Board agent conduct that tends to impair the Board's neutrality is sufficient ground for setting aside an election. This principle was espoused by the Board in *Athbro Precision Engineering Corp.*, 166 N.L.R.B. No. 116, 65 L.R.R.M. 1699, 1699 (1967), *vacated on other grounds*, 67 L.R.R.M. 2361 (D.D.C.), *acq.* 171 N.L.R.B. No. 4, 68 L.R.R.M. 1001 (1968), *enforced*, 423 F. 2d 573 (1st Cir. 1970), where it said:

> The Board in conducting representation elections must maintain and protect the integrity and neutrality of its procedures. The commission of an act by a Board Agent conducting an election which tends to destroy confidence in the Board's election process, or which could reasonably be interpreted as impugning the election standards we seek to maintain, is a sufficient basis for setting aside that election.

[3] One form of conduct that so impairs the appearance of Board neutrality is when a Board representative comments on a local issue in a campaign before the election. In *Monmouth Medical Center*, 234 N.L.R.B. No. 50, 97 L.R.R.M. 1350, 1353-54 (1978), the Board recognized that "the Board, in order to retain its neutrality, must refuse to answer a question regarding local issues in a campaign."

[4] The Board found that agent Wesa had not answered a question regarding local issues in a campaign because "Wesa was confronted with a general question, to which the record indicates she gave a general statement of law, not wedded to any factual pattern or party's position." This finding is not supported by the record.

Whether State Plating could give its employees raises during the campaign was certainly a local issue during the election campaign. State Plating, through Waring, claimed that it could not give raises, while the union contended it could. The employees who met at the union office to call the NLRB were seeking resolution of a specific issue of concern to them: Was Waring lying when he said he could not give them any raises?

That the employees were asking questions in regard to their own specific situation is clearly illustrated by undisputed testimony. For example, employee Banks testified, "We wanted to find out if Bill [Waring] was correct in what he said about giving raises out," Transcript at 51; employee Christine Jones testified, "I asked her [Wesa] if we were getting a regularly scheduled set of raises if Bill [Waring] could still give them," Transcript at 113; and union agent Winkle testified, "One question [Jones] asked was Bill [Waring] entitled to give regularly scheduled raises even if the union was mixed up in it," Transcript at 150. The consistent references to their employer's name indicates that the employees were concerned with their specific situation. That the employees were asking a specific question was partly recognized by the Board when it found that "it is established that 12 employees gathered at [the union] hall to seek answers to two questions: . . . (2) whether the Employer could legally grant them wage increases or whether it was unable to grant pay raises, as Waring had represented to them." The employees were not asking for a general statement of the law.

The effect of Wesa's comments may not be avoided by arguing that despite being asked a specific question, she responded with a general statement of law. The effect her comments had on the election must be examined from the employees' point of view. Wesa should have realized that the employees were concerned with a specific issue and

would take her statement as a specific answer to their concern.[5] Employees would not be expected to ask for a general statement of law when their concern was with whether *they* could be given *their* raises. The employees were not likely to realize that the words "regularly scheduled" were a term of art, or that whether the raises were "regularly scheduled" was a crucial issue. They would expect Wesa to inquire about the raises' regularity, if the answer turned on that information.

Even if Wesa could not have realized that the employees would misinterpret her statement, the fact remains that they did interpret it as applying to raises they hoped for or expected and their misinterpretation tainted the election. The uncontradicted testimony is that Wesa's comments led the employees to believe that Waring had lied to them. For example, employee Moore testified as follows:

> Q: It is my understanding of your testimony that you understood from Miss Wesa that Mr. Waring could give you that money if he wanted to?
>
> A: Yes.

Transcript at 130. The raise Moore believed she had been denied was based on her understanding that her work record would be reviewed periodically and she would get increases if she were entitled to them. No fixed periods for review were set. Moore also testified that she told other employees and Waring himself that Wesa had made Waring look like a liar. Waring testified that several employees accused him of lying.

[5] The appearance of a compromise of Board neutrality will warrant setting aside an election even if the

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[5]Whether Wesa should have realized she was asked a specific question is unimportant. Impairment of Board neutrality is dependent on the employee's perception of the Board agent's comments, not on who is to blame for that perception.

Board in fact remains neutral. In *Provincial House, Inc.* v. *NLRB*, 568 F. 2d 8 (6th Cir. 1977), a NLRB agent had interviewed witnesses for an unfair labor practice investigation in one part of a meeting room while the union agent conducted discussions of the possible unfair labor practice in another part of the room. This Court found that "the Board representative, whether inadvertently or not, allowed himself to be used in a manner which seriously affected the neutrality of the Board's procedures," 568 F. 2d at 11, and ordered the election set aside. In *Mercury Industries, Inc.*, 238 N.L.R.B. No. 124, 99 L.R.R.M. 1391, 1391 (1978), the Board said that its "concern is not with the substance of partisan additions made to an Agency document, but with the possible impact such an adjunct might have upon the freedom of choice of a voter."

[6] The undisputed evidence in this case is that the employees considered the NLRB to have endorsed, four days before the election, the union's position on a local issue of great concern to them. The Board's finding that its neutrality was not impaired by a comment on a local issue is therefore not supported by substantial evidence.

IV

The Board found that Wesa's "statement of the law regarding pre-election wage increases does not constitute a material misrepresentation, but is in fact an accurate representation of Board law." The Board thus found the election was proper because: "It is only when the Board in a pre-election context materially misstates the underlying law or interferes with the election process by imposing a legal conclusion upon a specific factual pattern that its conduct may be deemed objectionable."

We have concluded that Wesa's comments had the effect of imposing a legal conclusion on a specific factual pattern. As the Board found that Wesa had given only a general

statement of the law, it did not directly decide whether the specific conclusion that Waring could have lawfully awarded raises constituted a material misrepresentation. Before this Court, however, the NLRB contends that the employees were not misled by Wesa's statements because their conclusion that Waring could grant raises was correct. We disagree.

[7, 8] Granting benefits to employees before an election constitutes an unfair labor practice if motivated by a desire to induce votes against a union. No conditions or threats need be attached to the benefits to establish such motivation. *NLRB* v. *Exchange Parts Co.*, 375 U. S. 405, 84 S. Ct. 457, 11 L. Ed. 2d 435 (1964). If raises are granted after the election, petition is filed and before the election, the NLRB presumes the employer acted with an illegal motive. *See, e.g., NLRB* v. *Anchorage Times Publishing Co.*, 637 F. 2d 1359 (9th Cir.), *cert. denied*, 454 U. S. 835, 102 S. Ct. 137, 70 L. Ed. 2d 115 (1981); *NLRB* v. *Rich's, Inc.*, 578 F. 2d 880 (1st Cir. 1978); *NLRB* v. *Styletek, Division of Pandel-Bradford, Inc.*, 520 F. 2d 275 (1st Cir. 1975); *Baltimore Catering Co.*, 148 N.L.R.B. No. 101, 57 L.R.R.M. 1106 (1964). "The burden then shifts to the employer to justify both the fact and the timing of the increase." *Rich's*, 578 F. 2d at 884.

Whether Waring was correct in saying he could not give out raises during the pre-election period therefore depends on whether the presumption of illegal motive could have been rebutted. A brief review of a few cases in which employers have attempted to rebut this presumption will aid our analysis.

In *Ken McKenzie's, Inc.*, 221 N.L.R.B. No. 108, 90 L.R.R.M. 1545 (1975), the employer had an established policy of granting raises to its store employees in December of each year. In October 1973, a new store was opened. The employees at that store did not receive raises two months

later, in December 1973. They did receive raises in December 1974, one month before a union election was scheduled. The Board found that the raises unlawfully interfered with the election, terming the wage increases "unscheduled" since the employer had not previously announced that its policy would extend to the new store.

In *Baltimore Catering Co.*, 148 N.L.R.B. No. 101, 57 L.R.R.M. 1106 (1964), the employer announced wage increases the day after the union mailed an election petition. Five months earlier, the employer had begun to seek permission to raise its prices in order to pay for a wage increase. The Board found that this was insufficient to rebut the presumption since it did not justify the timing of the raises, and said: "The fact that the employees may have known about or otherwise anticipated the increase in wages is not necessarily controlling." 57 L.R.R.M. at 1107 (footnote omitted).

In *NLRB* v. *Newman-Green, Inc.*, 401 F. 2d 1 (7th Cir. 1968), the employer announced a new employee life insurance plan to be paid for by the employer one month before the election. Five months earlier the employer had assigned an officer to investigate life insurance plans to be paid for by the company. The court upheld the Board's findings of violations, saying:

> When the employer chose to announce the insurance program at the time and under the circumstances here, it took the risk that its conduct could justify the inference the Board drew, that the preparation of the insurance plan and its promulgation was timed to induce, or did induce, votes against the Union.

401 F. 2d at 3.

Finally, in *NLRB* v. *Styletek, Division of Pandel-Bradford, Inc.*, 520 F. 2d 275 (1st Cir. 1975), the court made the following comment in upholding the Board's finding that

the employer's need to revamp the wage structure for its rapidly growing work force did not rebut the presumption:

> The Board has often said that when economic circumstances call for wage changes and a representative election is pending, the employer should act as he would if the union were not on the scene. . . . The advice, as this case demonstrates, is obviously perilous unless the employer can support with very specific facts the reason for granting benefits just then.

520 F. 2d at 281 n. 5.

The evidence presented at the election certification hearing shows that State Plating had made no prior announcement of scheduled raises; no decisions on raises had in fact been made. State Plating's history of wage increases shows two things: (1) State Plating granted frequent raises, often given to an employee twice or more in a year, and sometimes as often as every month, most often in April and September or October, so that had no election been held at least some employees would very probably have received raises during the two-month period prior to the election; but (2) the raises were granted inconsistently or even haphazardly, so that it was impossible to predict judging solely from the history when any particular employee would receive a raise or how much the raise would be. It would have been well nigh impossible for State Plating to rebut the presumption of illegal motive with respect to any raises it might have awarded before the election.[6] Any raise

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[6]The Board did not specify the raises it thought State Plating would have been allowed to give. This is perhaps due to the fact that no such specification is suggested by State Plating's history of granting wage increases. Unless both the amount and timing of particular raises are specified by the employer before the organizational campaign, however, the Board will consider *any* raises given during the campaign to have been improperly motivated.

which State Plating might have given could have been considered designed to influence the election because the employee who received the raise would have had his uncertainties concerning his employer's evaluation of him assuaged.

The presumption of improper motive has only been found rebutted when the details of the raises were established before the start of the election campaign. For example, in *NLRB* v. *Hasbro Industries*, 672 F. 2d 978 (1st Cir. 1982), the employer had scheduled and listed on the payroll both the amounts and the timing of raises to be given particular employees. The court overturned the Board's finding that these raises, given just before the election but planned before it was known there would be an election, improperly influenced the election. Even then the Board had found the raises improper. This is also not a case such as *Havatampa Cigar Corp.*, 175 N.L.R.B. No. 109, 71 L.R.R.M. 1037 (1969), where an announcement of benefits the day before the election was found justified by the fact that management had decided on the benefits a month before the union petitoned for an election, but had to dalay the announcement until after the plan was approved at a routine board of directors' meeting two days before the election.

[9] Waring's statement that State Plating could not award raises during the election campaign period would therefore appear to be correct, and the conclusions the employees understandably reached from Wesa's comments were wrong. The effect of Wesa's statement was to misrepresent the law to the employees.

We note that even if Wesa's comments were construed to be only a general statement of the law, that statement

was incomplete and likely to mislead.[7] Wesa testified that she told the employees that "an employer's best approach in determining whether to grant a pay raise is to do what he normally would do if there had been no petition filed whatsoever." Wesa did not explain that any raises given before the election would be presumed to be motivated by a desire to affect the election. Especially in light of the strict application given that presumption by the Board, we agree with the First Circuit that such advice "is obviously perilous unless the employer can support with very specific facts the reason for granting benefits just then." *Styletek,* 520 F. 2d at 281 n. 5.

V.

[10] The Board's neutrality was destroyed by the NLRB agent's comment on a local issue which misled employees into believing that their employer had lied to them. The Board's findings to the contrary are not supported by substantial evidence. As the election was tainted by this failure of Board neutrality, the union was improperly certified.[8] Accordingly, the Board's application for enforcement of its bargaining order is denied.

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[7]The Board passed up an opportunity to remedy the incompleteness of Wesa's statement when State Plating asked the Board to give the employees a further explanation of the law regarding wage increases and the Board refused.

[8]In view of our conclusion with respect to the effect of the NLRB agent's comments, we need not consider State Plating's arguments concerning a union representative's alleged misrepresentation and abuse of Board processes.

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

No. 10754

SCHNEIDER MILLS, INC. and
JIMMY AND JOSH, INC., - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

Argued October 3, 1967.
Decided January 8, 1968.

Proceeding on petition for review of order of National Labor Relations Board directing employer to bargain with union on ground that employee representation election was valid. The Court of Appeals, Winter, Circuit Judge, held that election was invalid because of union's improper election propaganda.

Enforcement denied.

Sobeloff and Craven, Circuit Judges, dissented.

1. Labor Relations Key 211

Employee representation election was invalid because of union's improper election propaganda, where handbill distributed on eve and day of election falsely asserted that corporate employer's president had stated that he wished he could tie two women employees, who were active unionists, to their machines and burn them to death and likened president to Hitler, and radio broadcasts on eve and day of election contained misrepresentations concerning bene-

fits gained as result of union-led strike by employees of another employer. National Labor Relations Act, § 8(a) (1, 5), 29 U.S.C.A. § 158(a) (1, 5).

2. Labor Relations Key 214

In determining whether union handbill, which charged corporate employer's president with statement that he wished he could tie two women employees, who were active unionists, to their machines and burn them to death, was sufficient to make invalid employee representation election, toward which handbill was directed, Court of Appeals would treat alleged statement as never made, in view of rejection of employer's proffer of proof, in unfair labor practice hearing before regional director, that president had not made such a statement. National Labor Relations Act, § 8(a) (1, 5), 29 U.S.C.A. § 158(a) (1, 5).

3. Labor Relations Key 214

Control of employee representation election under National Labor Relations Act and determination of steps necessary to conduct election fairly are matters which Congress has entrusted to National Labor Relations Board alone.

4. Labor Relations—Key 210

Key factor in setting aside election of exclusive bargaining representative of employees, whether because of conduct of parties or of National Labor Relations Board, is failure of those in bargaining unit to make their collective decision effective.

5. Labor Relations—Key 214

Whether employee representation election has been conducted under conditions compatible with exercise of free choice by employees is matter which Congress has committed to discretion of National Labor Relations Board.

6. Labor Relations Key 214

Only when board has abused its discretion in promulgation or application of standards applied in employee representation election will courts overrule board's determination regarding validity of representation election.

7. Labor Relations Key 214

Union's misrepresentations in radio broadcasts on eve and day of employee representation election were preserved for review of National Labor Relations Board's order, where text of broadcasts was before regional director in his investigation of election, and employer based exceptions to board on broadcasts, and proffered proof to trial examiner, and excepted to trial examiner's decision on such ground. National Labor Relations Act, § 8(a) (1, 5), 29 U.S.C.A § 158(a) (1, 5).

8. Labor Relations Key 214

To extent that new and enlarged misrepresentations were made by union in radio broacasts on eve and day of employee representation election, defense that broadcasts were only repetitive of statements in handbills answered by employer was not a defense to the misrepresentations in review of National Labor Relaations Board's order which was based on assumption that election was valid. National Labor Relations Act, § 8(a) (1, 5), 29 U.S.C.A. § 158 (a) (1, 5).

Arthur McM. Erwin, Spartanburg, S.C., for petitioner.

Allison M. Brown, Jr., Atty., N.L.R.B. (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Associate Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, N.L.R.B., on the brief) for respondent.

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges.*

WINTER, Circuit Judge:

[1] Schneider Mills, Inc. and Jimmy and Josh, Inc. (collectively called the "company"), which carry on a unitary business of manufacturing textiles and textile products, with principal officies and places of business at Taylorsville, North Carolina, petition to set aside the findings of the Board that the company violated §§ 8(a)(5) and 8(a)(1) of the Act by its conceded refusal to bargain with the Textile Workers Union of America, AFL-CIO (the "union").[1] The petition, and resistance to enforcement of the Board's order directing bargaining, are predicated upon the contention that the union was not certified as the representative of the company's production and maintenance employees *pursuant to a valid representation election.* We agree that the election was not valid, because of the union's improper election propaganda. We set aside the finding and refuse enforcement of the order.

The election, pursuant to which the union was certified, was held November 5, 1965, under the direction of the Regional Director for the Eleventh Regional Office of the Board. At the election, a majority of the employees voted in favor of representation by the union.[2] The company

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*The case was heard initially on January 13, 1967 before a panel consisting of Sobeloff and Craven, Circuit Judges, and Kaufman, District Judge.

[1]While the company's petition prays only that the order be set aside, the Board's answer prays enforcement of the order.

[2]Of the approximately 404 employees eligible to vote in the election, 365 cast valid ballots. Of these ballots, 211 were cast in favor of representation by the union and 154 were cast against representation by the union. In addition to the 365 valid ballots,

(Footnote Continued on Next Page)

filed timely objections to the election, but the Regional Director, after investigation, concluded that the objections of the company were without merit and certified the union. When the company refused to bargain with the union, it was charged with an unfair labor practice, violative of §§ 8(a) (5) and 8(a) (1). At the hearing on the unfair labor practice charges, the company proffered what it intended to prove, but the trial examiner refused receipt of the formal proof and granted general counsel's motion for judgment on the pleadings, stating that no factual matters requiring the taking of testimony or receipt of other evidence were raised by the company. The Board adopted the trial examiner's decision without modification.

Specifically, the company's challenge to the validity of the representation election is predicated upon three union handbills, two of which were circulated on October 21 and November 2, respectively, and the third on the eve and day of the election, and upon the union-sponsored radio broadcasts on the eve of election which were repeated throughout the day of election. Our conclusion that the union's propaganda invalidated the election rests on the third handbill and the radio broacasts; hence, we find it unnecessary to consider fully the other handbills.

In language undeniably offensive, the handbill of November 4-5 sought to impugn the character and motives of Mr. Schneider, the president of the Company, in resisting unionization. The challenged portion of the handbill reads as follows:

> "We have been told that he [Schneider] made the remark that he wished he could tie two of the women employees, who are active in the Union, to their machines

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(Footnote Continued From Preceding Page)

there were 14 ballots which were challenged—a number insufficient to affect the results of the election.

and set them on fire and watch them burn to death. A person who talks like this is bound to be mentally disturbed and dangerous to be around. This type of filth is what a half million American boys gave their lives to prevent in World War II—to keep another mad man by the the name of Hitler from destroying the world."

[2] On the record before us, we must treat the alleged statement of Mr. Schneider as never made. At the unfair labor practice hearing, the company proffered to prove that Mr. Schneider did not make such a statement. It is true that the Regional Director in concluding to issue a Certificate of Representative noted that evidence was offered during the course of the investigation conducted by him which tended to show that a similar remark was in fact made by Mr. Schneider, and that representatives of the union were informed of it. The Regional Director found it unnecessary to determine whether or not such a statement was actually made, in view of his conclusion that name-calling and insulting or derogatory statements by one party about another during an election do not warrant setting aside the results of the election. The evidence to which he referred is not included in the record before us. Absent such evidence and in the light of the company's rejected proffer of proof to the contrary, we assume the facts of the matter in the light most favorable to the company and decide the question raised by the handbill on the basis that Mr. Schneider did *not* make such a statement.

The radio broadcasts undertook falsely to assert benefits purportedly gained as a result of a union-led strike by employees at the Collins & Aikman plant in Albemarle, North Carolina, some seventy miles from Taylorsville. Some of the assertions in the broadcasts were being made for the first time, but some of them were repetitious of

what had been earlier claimed in the handbill of November 2. The Regional Director found that the November 2 handbill was distributed at a time when the company was able to controvert the false statements contained therein and that, in fact, they had been controverted by the company in a campaign flyer, entitled "FACT SHEET," on November 4, one day before the election. The statements contained in the radio broadcasts, their accuracy, and whether they had been previously asserted in the November 2 handbill, are as follows:

1. "Allowance of 15 minutes paid lunch period, 5 minutes for 'wash-up and clean-up' time."

"Allowance for no less than 15% 'rest time' for workers on all job assignments in the plant."

From these statements, broadcast seriatim, a listener would understand that the benefits described were being stated conjunctively. The Regional Director found that the paid lunch period was a part of the fatigue and personal time, so that the representation that two nonduplicating benefits had been obtained by the union was false. This part of the statements was in the handbill and was repeated in the broadcast. New in the broadcast was the representation that an additional 5 minutes was allowed for "wash-up" and "clean-up" time. In the light of the Regional Director's finding this representation was also false.

2. "Overtime * * * for the sixth day work and double time for Sunday work."

The Regional Director found that the Collins & Aikman contract did provide for double time for Sunday work, but only when Sunday was the seventh consecutive day worked. The statement is substantially a repetition of the misrepresentation contained in the November 2 handbill.

3. "Premiums on Insurance Benefits for employees will be paid by the company and provides * * * Hospital, Health

and Surgical coverage, plus Sick Leave pay of $15.00 per week."

The Regional Director found that the provision for sick leave pay was applicable only after the seventh consecutive day of illness. This misrepresentation was a repetition of that contained in the earlier handbill.

4. "During the negotiation sessions both parties had agreed to adoption of the general wage increase ranging from 5 cents to 7 cents an hour, plus 8 weeks back wages."

The Regional Director found that the contract provided for a wage increase of from 5 to 10 cents per hour but that the increase had been unilaterally granted by the employer in August and the contract made it retroactive to June. This misrepresentation was substantially a restatement of that contained in the handbill.

5. "The strike was called by the employees and not by the Union. The Union fed, and paid all bills of the workers while they were on strike."

In the previous handbill the union had claimed that during the strike at the Collins & Aikman plant the union had paid *the* bills, as distinguished from *all* bills, of the strikers. In regard to the previous handbill, the Regional Director found that "[I]nvestigation discloses that the Petitioner [union] did in fact spend substantial sums in providing various striks benefits * * *." From this finding we infer that the broadcast statement was a misrepresentation, more clearly false than its predecessor.

[3] Unquestionably, under the decided cases "the control of the election proceeding and the determination of the steps necessary to conduct that election fairly were matters that Congress entrusted to the Board alone." National Labor Relations Board v. Waterman S.S. Corp., 309 U. S. 206, 226, 60 S. Ct. 493, 503, 84 L. Ed. 704 (1940). Elsewhere stated, "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safe-

guards necessary to insure the fair and free choice of bargaining representatives by employees." National Labor Relations Board v. A. J. Tower Co., 329 U. S. 324, 330, 67 S. Ct. 324, 328, 91 L. Ed. 322 (1946).

[4-6] The decisions of this Court are fully in accord with the quoted statements of the Supreme Court. We said recently in Overnite Transportation Company v. National Labor Relations Board, 327 F. 2d 36, 41 (4 Cir. 1963), "The key factor in setting aside an election, whether by virtue of the conduct of the parties or of the Board, is the failure of those in the bargaining unit to make their collective desire effective." And this statement must be read in the context of our earlier pronouncement that "Whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board." National Labor Relations Board v. Shirlington Supermarket, Inc., 224 F. 2d 649, 651 (4 Cir. 1955). See also, National Labor Relations Board v. National Plastic Products Co., 175 F. 2d 755 (4 Cir. 1949). Only if it is found that the Board abused its discretion in the promulgation or application of such standards will the Courts overrule the Board's determination regarding the validity of a representation election. National Labor Relations Board v. Shirlington Supermarket, Inc., supra; National Labor Relations Board v. National Plastic Products Co., supra.[3]

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[3]In Celanese Corporation of America v. National Labor Relations Board, 279 F. 2d 204 (7 Cir. 1960), cert. granted and remanded, 365 U. S. 297, 81 S. Ct. 689, 5 L. Ed. 2d 688 (1961), on remand 291 F. 2d 224 (7 Cir. 1961), cert. den., 368 U. S. 925, 82 S. Ct. 360, 7 L. Ed. 2d 189 (1961), a distinction is apparently made between the scope of judicial review over the Board's wide discretion in promulgating standards for free and fair elections and the scope of judicial review in the application of these standards. Our decisions do not recognize the distinction.

Reference need be made to only two of the Board's decisions establishing its basic policy and its general standards respecting the rights of employees to a free and unrestrained choice in representation elections. In Liberal Market, Inc., 108 N.L.R.B. 1481, 1482 (1954), the Board stated:

> "In deciding whether the registration of a free choice is shown to have been unlikely, the Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. It follows that elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards. * * * Basically, we feel that the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside. Like any other contest in which the stakes are high, the losing party is likely to protest the result, but this Board cannot be influenced by any subjective considerations."

The leading decision of the Board setting forth the standard for determining the validity of an election is *Hollywood Ceramics Co.*, Inc., 140 N.L.R.B. 221, 224 (1962), where the Board said:

> "We believe that an election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an ef-

> fecetive reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election."

See also, Walgreen Co., 140 N.L.R.B. 1141 (1963); The Cleveland Trencher Company, 130 N.L.R.B. 600 (1961); Thomas Gouzoule, et al., d/b/a The Calidyne Company, 117 N.L.R.B. 1026 (1957); Reiss Associates, Inc. 116 N.L.R.B. 217 (1956); The Gummed Products Company, 112 N.L.R.B. 1092 (1955).

With full respect to the discretion vested in the Board, not only to establish standards for the conduct of a valid representation election but also to determine if those standards have been met, we can only conclude that the Board abused its discretion in holding that the election in the case at bar met its tests.

First as to the November 4-5, handbill, we recognize that, in political elections, exaggerations, hyperbole and appeals to the emotions are the stuff of which election campaigns are made. "Laboratory conditions" rarely prevail. And even if we were to conclude that in political elections, democracy has taken a backward step in the acceptance of these departures from the truth and that in representaiton elections an analogous regression should not be tolerated, our limited scope of review would prevent such a decision. The false statements in the November 4-5 handbill, however, exceed by far permissible standards in political elections no matter how lax.

The statement falsely attributed to Schneider that he would like to see two tied workers incinerated depicts in him such a degree of inhumanity that employees not otherwise disposed to support the union could well conclude that a union would be their only source of protection, thus interfering substantially with their free and untrammeled choice. But the statement went further. It compared Schneider to Hitler, and thereby interjected into the election one of the

most sordid episodes of modern history, with all of its overtones of religious persecution. Even though only a single instance, for employees in general, and, in particular any employee having any identity with any group persecuted or partially annihilated under the Hilter regime, such propaganda was of a highly inflammatory nature and was manifestly not germane to the issues at stake in the election. That inflammatory statements which "create conditions which make impossible a sober, informed exercise of the franchise" and which are also both not truthful and not germane to the issues bofore the employees invalidate elections, has been recognized by the Board and approved by this Court. Sewell Manufacturing Co., 138 N.L.R.B. 66, 71-72 (1962); National Labor Relations Board v. Schapiro & Whitehouse, Inc., 356 F. 2d 675, 679 (4 Cir. 1966). We think the statements in the November 4-5 handbill are of this nature.

[7, 8] The misrepresentations in the November 4-5 broadcasts dealt with fringe benefits, and with one of the economic consequences of resort to a strike. These were matters of vital concern to employees voting in the election. The Cleveland Trencher Company, supra, at 603; Coca Cola Bottling Company of Louisville, 150 N.L.R.B. 397, 400 (1964).[4] Union misrepresentations concerning wage rates

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[4]In dealing with the broadcasts, we are met at the outset with the Board's contention that the company seeks to create a new ground for objecting to the election because it did not assert the invalidity of the election on this ground in the proceedings before the Regional Director or the Board. The company asserts, and the Board does not deny, that the text of the broadcasts was before the Regional Director in his investigation of the election. The record shows that the company relied on the falsity of the broadcasts in its exceptions to the Board concerning the Regional Director's decision, proffered proof to the trial examinar in the unfair labor practice hearing and excepted to the trial examiner's decision, *inter alia*, on this ground. We consider the point preserved for review.

and fringe benefits purportedly obtained by a union for other employees may be of such a substantial nature as to be expected to have a significant impact on an election. Cleveland Trencher Co., supra; Kawneer Co., 119 N.L.R.B. 1460 (1958); Reiss Associates, Inc., supra; The Gummed Products Company, supra. The substantiality of the misrepresentations is not contested by the Board; it defends on the grounds that the company answered the statements contained in the November 2 handbill, and that the broadcasts were merely repetitious of the former.

We reject the defense for several reasons. What was said in the broadcasts was not only repetitive of the statements in the November 2 handbill. One of the statements was a misrepresentation that had not been made before, and another was a prior misrepresentation enlarged upon. To the extent that the new and the enlarged misrepresentations were made, the company had no opportunity to make an effective reply. Hollywood Ceramics Co., Inc., supra. To the extent that previously made misrepresentations were repeated, we think that their vitiating effect on the validity of the election can be obviated only if the company had a second opportunity to make an effective reply, whether the company availed itself of the opportunity or not. It is clear in this case that the company had no such opportunity. Such a rule, we think, was prescribed by the Board in The Gummed Products Company, supra, at 1094, and the Board abused its discreation by not applying it in this case.

Enforcement denied.

SOBELOFF and CRAVEN, Circuit Judges (dissenting):

Our brethren, we think, overestimate the effect of the intemperate characterization of the employer made by employees in the election campaign.

If courts were to fix a criterion compelling the Board to set aside every union election in which there has been invec-

tive and vituperation, they would be establishing a loftier standard than has ever been demanded in any political election, and hardly any representation election would pass muster. However distasteful and unjust the statement may have been, nothing that was said about the employer exceeds in intensity what in our democracy has been heard in this generation and throughout our history about presidents, governors, congressmen and other officials. Voters must be trusted to exercise a wholesome selectivity in appraising the militant and sometimes overdrawn rhetoric in employer-union contests as in civic electioneering, where hard words are a commonplace.

It would be a rare case in which employees would be really swayed or misled when a union organizer calls the boss a tyrant or a Hilter or when an employer calls the union organizer an agitator or a communist. There is no ground in the present instance for thinking that this type of invective intimidated, nor is there any evidence of threats, express or implied. The offending statement must be judged by its probable impact on the electorate, and it was within the province of the Board to assess the influnce, if any, of the union's statement within the totality of circumstances surrounding the election. Its expertise ought not to be supplanted by the court's speculation, and we should not open the door to endless post-election inquires which threaten to impair the election process more seriously than the characterizations complained of.

Nor should the Board's determination of the effect of the alleged misrepresentations of economic facts be overturned. Such misstatements made without adequate opportunity for reply may in some instances affect the result sufficiently to vitiate an election. However, the misstatements charged in this case do not meet this measure, as District Judge Kaufman demonstrates in the able and thorough

opinion prepared by him as a designated member of the original panel of this court.

Without attempting to restate the evidence or elaborate the reasons for our conclusions, we adopt Judge Kaufman's opinion and reproduce it as an appendix to this dissent.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,754.

SCHNEIDER MILLS, INC. and
JIMMY AND JOSH, INC., - - - - - - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, - - *Respondent.*

On Petition for Review and Cross-Petition to Enforce an Order of the National Labor Relations Board.

(Argued January 13, 1967. Decided _____.)

Before SOBELOFF and CRAVEN, Circuit Judges, and KAUFMAN, District Judge.

Arthur McM. Erwin for Petitioner.

Allison W. Brown, Jr., Attorney, National Labor Relations Board, for Respondent.

KAUFMAN, District Judge:

Petitioner, Schneider Mills, Inc. and Jimmy and Josh, Inc. (the Company), seeks to set aside an order of the National Labor Relations Board ordering the Company to bargain with the Textile Workers Union of America, AFL-CIO (the Union). The case presents questions concerning the permissible bounds of election propaganda under the National Labor Relations Act.[1] The Board found the Com-

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[1] 29 U.S.C.A. §§ 151-167.

pany guilty of unfair labor practices[2] based upon a finding that it refused to bargain with the Union. The Company, which maintains and operates a textile factory at Taylorsville, North Carolina, admits the refusal to bargain but denies that the Union was certified as the representative of its production and maintenance employees pursuant to a vaild representation election.

A representation election was held among these employees on November 5, 1965, under the direction of the Regional Director for the Eleventh Regional Office of the Board. At this election a majority of the employees voted in favor of representation by the Union.[3] The Company filed timely objections to the election. The Regional Director, after investigation, concluded that the objections of the Company were without merit and certified the Union. Upon application by the Company the Board refused to review or set aside the action of the Regional Director. Thereafter, the Company refused to bargain with the Union, and the Board's General Counsel instituted unfair labor practice charges against the Company. At the hearing in the unfair labor practice proceeding, after the Company proffered what it intended to prove, the Trail Examiner granted the General Counsel's motion for judgment on the pleadings, stating that no factual matters requiring the taking of testimony or evidence were raised by the Company. The Board affirmed the decision of its Trial Examiner and ordered the Company to bargain with the Union. The Com-

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[2]NLRA §§ 8(a) (1) and (5), 29 U.S.C.A. §§ 158(a) (1) and (5).

[3]Of the approximately 404 employees eligible to vote in the election, 365 cast valid ballots. Of these ballots, 211 were cast in favor of representation by the Union and 154 were cast against the Union. In addition to the 365 valid ballots, there were 14 ballots which were challenged—a number insufficient to affect the results of the election.

pany has petitioned this Court to set aside the Board's order on the ground that during the campaign which preceded the representation election the Union "made representations and engaged in campaign trickery which involved a substantial departure from the truth at a time when the Employer was unable to make an effective reply."[4] Specifically, the Company challenges the validity of the representation election because of three Union handbills and because of Union-sponsored radio broadcasts during the election campaign. The Company contends, in effect, that these items of campaign propaganda were of such a nature as to interfere with the free and unrestrained choice of the employees and that therefore the results of the election and what otherwise must be taken to be the collective desire of a majority of employees in the bargaining unit should be set aside.[5] A decision of the employees is not free and unrestrained unless it is untainted by coercion. Nor is there a choice unless the "employees have access to relevant information, that they use this data to determine the possible consequences of selecting or rejecting the union, and

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[4]This is the third of three objections which the Company filed with the Regional Director. The first and second objections related to questions concerning the eligibility of certain employees to vote in the election. The Regional Director and the Trial Examiner ruled adversely to the Company with regard to all three objections. Since the Company has not referred to the first and second objections, either in its petition for review by this Court or in its brief or during oral argument in these proceedings, we hold that the Company has abandoned those objections and will not further consider them in connection with this proceeding.

[5]Overnite Transportation Company v. N.L.R.B., 327 F. 2d 36, 41 (4th Cir. 1963) ("The key factor in setting aside an election, whether by virtue of the conduct of the parties or of the Board, is the failure of those in the bargaining unit to make their collective desire effective."); Hollywood Ceramics Co., 140 N.L.R.B. 221, 223-224 (1962).

that they appraise these possibilities in light of their own values and desires to determine whether a vote for the union promises to promote or impair their interests."[6] Where it is clear that such free and unrestrained choice in a representation election has been interfered with, the Board and, if necessary, the Courts should not hesitate to set that election aside. In most cases, however, it is exceedingly difficult to determine whether campaign propaganda has had that proscribed effect. For this reason the task of establishing and enforcing standards to safeguard the free ballot in representation elections is one which lies initially with the Board, a body which "Congress has entrusted * * * with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." N.L.R.B. v. A. J. Tower Co., 329 U. S. 324, 330, 67 S. Ct. 324, 328, 91 L. Ed. 322 (1946). "Whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board." N.L.R.B. v. Shirlington Supermarket, Inc., 224 F. 2d 649, 651 (4th Cir. 1955). Only if it is found that the Board has abused its wide discretion in the promulgation or application of such standards will the Courts overrule the Board's determination regarding the validity of a representation election. N.L.R.B. v. Jesse Jones Sausage Co., 309 F. 2d 664 (4th Cir. 1962); N.L.R.B. v Shirlington Supermarket, Inc., supra, 224 F. 2d at 652-653; N.L.R.B. v.

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[6]D. Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 46 (1964).

National Plastic Products Co., 175 F. 2d 755, 758 (4th Cir. 1949).[7]

In establishing standards to safeguard the right of employees to a free and unrestrained choice in representation elections the Board has given due recognition to the fact that elections of any kind, if truly free, are not the easy subjects of close regulation. As was stated in Liberal Market, Inc., 108 N.L.R.B. 1481, 1482 (1954):

> In deciding whether the registration of a free choice is shown to have been unlikely, the Board must recognize that Board elections do not occur in a laboratory where controlled or artificial conditions may be established. We seek to establish ideal conditions insofar as possible, but we appraise the actual facts in the light of realistic standards of human conduct. It follows that

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[7]In determining whether or not the Board has abused its discretion, the Court's inquiry is directed to the question of whether the Board's findings are supported by substantial evidence. As was said in Celanese Corp. of America v. N.L.R.B., 291 F. 2d 224 (7th Cir. 1961):

> There is no conflict or contradiction between the substantial evidence rule determinative of the scope of review and the principle whereunder the Board is entrusted with wide discretion in establishing the procedures and safeguards necessary to insure the fair and free choice of bargaining representative as enunciated in National Labor Relations Board v. A. J. Tower Co. * * *. These rules do not conflict because they affect differing spheres of activity. The Board's wide discretion lies in the initial promulgation of rules and regulations, while the court exercises its duties in reviewing decisions involving application of the Board's rules. Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board. [291 F. 2d at 225].

> elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards. * * * Basically, we feel that the results of a secret ballot, conducted under Government sponsorship and with all the safeguards which have been developed throughout the years, should not be lightly set aside. Like any other contest in which the stakes are high, the losing party is likely to protest the result, but this Board cannot be influenced by any subjective considerations.

The standard most often alluded to by the Board is set forth in Hollywood Ceramics Co., 140 N.L.R.B. 221, 224 (1962), in which the Board stated:

> We believe that an election should be set aside only where there has been a misrepresentation or other substantial campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

The question which is presently before this Court for decision is whether, under these legal standards, the Board reasonably exercised its discretion in refusing to set aside the representation election of November 5, 1965. We answer that question in the affirmative and direct that the order of the Board in this case be enforced. In so doing, we find that the Company did not proffer at the unfair labor practice proceeding evidence of any substantial and material factual issue which required the Trial Examiner to take testimony. See N. L. R. B. v. Atkinson Dredging Co., 329 F. 2d 158, 164 (4th Cir. 1964); compare N. L. R. B. v. Lord Baltimore Press, Inc., 300 F. 2d 671 (4th Cir. 1962). In so doing, we also find it appropriate to discuss separ-

ately each of the challenged items of campaign propaganda.

One. In a mimeographed throwaway handbill (which is encaptioned "Poor Mr. Textile Boss!") distributed to the employees on October 21, 1965, the Union made certain statements concerning wage rates and other benefits purportedly enjoyed by unionized employees of northern textile manufacturers. The portion of the handout which the Company challenges reads as follows:

> Northern Textile Manufacturers whose employees belong to the TEXTILE WORKERS UNION OF AMERICA, AFL-CIO often pay as high as $3.50 an hour for winders, spinners, weavers, fixers, card tenders, inspectors and twisters. Workers often make as high as $148.00 a week, for 40 hours work.

The Company claims that this representation is false and misleading and that it concerns matters which were within the Union's special and exclusive knowledge. The Regional Director assumed without deciding that the statements objected to did misrepresent the wage and workload situation in northern textile plants, but found the Company's objection to be without merit on the ground that because the handbill was distributed more than two weeks prior to the election, the Company had ample time within which to reply.

We agree with the Regional Director. The handbill of October 21 was not, in relation to the election held on November 5, made at a time which would prevent the Company from making an effective reply. "[A]s the opportunity to reply is enhanced, the need for regulating the content of speech tends to diminish."[8] We cannot say that the Regional Director abused his discretion in determining

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[8] D. Bok, *supra* at 91.

that two weeks constituted a sufficient period of time within which to make an effective reply to a campaign circular of this character. The Company argues that no effective reply could have been made by it under the standards established in the *Hollywood Ceramics* case because the assertions made in the handbill were peculiarly within the knowledge of the Union, particularly since the northern textile mills referred to by the Union were not identified. But in determining whether or not there existed the opportunity to make an effective reply to a piece of campaign literature, the Board is not required to assume a party devoid of imagination or industry or the ability to assemble economic data and argument to make an effective reply.

Two. On November 2, 1965, three days before the election, the Union distributed a handbill which described benefits purportedly gained, as the result of a strike, by employees at the Collins & Aikman plant in Albemarle, North Carolina, some seventy miles from Taylorsville. The Company makes a number of separate objections to statements made by the Union in this handbill. The Regional Director made separate findings thereon with regard to each of these statements.

1. The handbill stated that the Collins & Aikman employees "now have a Union contract." The Regional Director found that although the contract between the Union and Collins & Aikman was not formally signed until November 15, thirteen days after the handbill was distributed, all of the provisions of that contract had been agreed to and initialled by the parties at the time the strike was settled on October 29. In its offer of proof before the Trial Examiner in the unfair labor practice hearing, the Company offered to prove nothing at variance with this finding by the Regional Director.

2. The handbill asserted that the contract gave the Collins & Aikman employees a wage increase of 5 to 7 cents

an hour retroactive to June, 1965. The Regional Director found that the contract provided for a wage increase of from 5 to 10 cents per hour but that the increase had been unilaterally granted by the employer in August and the contract made it retroactive to June. Again, at the hearing, the Company did not offer to prove anything contrary to the Regional Director's finding.

3. The handbill stated that the Collins contract called "for double time for all work performed on Sundays." The Regional Director found that the contract did provide for double time for Sunday work but only when Sunday was the seventh consecutive day worked. The Company at the hearing before the Trail Examiner offered to prove nothing to the contrary.

4. The Collins contract is described as providing for at least 15% rest time on all jobs and for a paid lunch period. The Regional Director found that while both statements were true, the lunch period was part of the rest time allowed and not additional time. The Company offered to prove that the rest time "included lunch period and a wash-up period and other time down on machines," but offered no other proof concerning the falsity of the statement.

5. The handbill stated that the Collins contract provided for $15.00 a week sick leave pay. The Regional Director found that this provision applied only after the seventh consecutive day of illness. The Company did not offer to prove that the statement was false in any other respect.

6. The handbill claimed that the average rate of pay at Collins & Aikman "is now around $2.00 per hour." The Regional Director found that the wage scale at Collins & Aikman ran from $1.44 to $2.25 per hour and that the unweighted average for all employee classifications was $1.73 an hour. The Company offered to prove nothing to the contrary.

It is clear that misrepresentations such as those which are challenged by the Company in regard to the handbill of November 2 may require that an election be set aside. Union misrepresentations concerning wage rates and other benefits purportedly obtained by the Union for other employees may be of such a substantial nature as to be expected to have a significant impact on the election. Cleveland Trencher Co., 130 N.L.R.B. 600 (1961); Kawneer Co., 119 N.L.R.B. 1460 (1958); Reiss Associates, Inc., 116 N.L.R.B. 217 (1956); Gummed Products Co., 112 N.L.R.B. 1092 (1955); D. Bok, supra at 90-91. In the present case, however, the Regional Director concluded that while certain of the statements complained of in the November 2 handbill did misrepresent or exaggerate the true facts of the Collins contract, the Company in fact made an effective reply to the Union's misrepresentations.

On November 4, two days after the distribution of the Union handbill and one day before the election, the Company issued a campaign flyer headed "FACT SHEET." This flyer purported to present "the true facts about the Collins and Aikman strike and how the top Union Officials of the TWUA Union sold the local Union members at Albemarle out at secret or unannounced meeting—at which the local Union representatives were not present." In connection with the settlement at Collins & Aikman, the flyer proclaimed in banners:

NO WAGE INCREASE
NO INCREASE IN FRINGE BENEFITS
NO ARBITRATION PROVISION
NO CHECK-OFF

Attached to the flyer was what purported to be a three-page news release from the management of Collins & Aikman which, if accurate, completely supported the banner assertions on the Company's flyer and, in view of its source,

lent an authenticity to the Company's version of the Collins & Aikman dispute. As the Regional Director stated:

> The thrust of Petitioner's [the Union's] statement is that it had been able to do and had done much for the C & A employees. The thrust of the Employer's [the Company's] reply is that the Petitioner had done nothing for them, but rather had sold them out.

We agree with the Regional Director that under the circumstances the Company not only had ample opportunity within to make an effective reply to the Union's misrepresentations but that such a reply was in fact made by the Company.

Three. The most serious issue which the Company raises in regard to the Union's campaign publicity arises in connection with a statement contained in a Union handout distributed on the day of the election, November 5. This undeniably offensive handbill seeks to impugn the character and motives of Mr. Schneider, the President of the Company. The challenged portion of the handbill reads as follows:

> We have been told he [Schneider] made the remark that he wished he could tie two of the women employees, who are active in the Union, to their machines and set them on fire and watch them burn to death. A person who talks like this is bound to be mentally disturbed and dangerous to be around. This type of filth is what a half million American boys gave their lives to prevent in World War II—to keep another mad man by the name of Hitler from destroying the world.

The Regional Director noted that evidence was presented during the course of the investigation conducted by him which tended to show that a substantially similar remark was in fact made by Mr. Schneider and that representatives of the Union were informed of it. The Regional Director,

however, felt that it was unnecessary for him to determine whether or not such a statement was actually made by Mr. Schneider in view of his conclusion that name-calling and insulting or derogatory statements by one party about another during an election do not warrant setting aside the results of the election. In view of the fact that at the unfair labor practice hearing counsel for the Company offered to prove that Mr. Schneider did not make such a statement, an offer which the Trial Examiner rejected, we must assume the facts of the matter in the light most favorable to the Company and decide the questions raised by the handbill of November 5 on the basis that Mr. Schneider did not make such a statement. Upon this assumption we conclude that however reprehensible such campaign propaganda may be, the Board did not abuse its discretion in refusing to set aside the election on the basis of this item of campaign propaganda.

As we have already noted, a representation election will be set aside only if it appears likely that the nature of campaign propaganda is such as might reasonably be expected to have interfered with the free and unrestrained choice of the employees. It is difficult enough to determine with any degree of assurance whether misrepresentations as to wages, fringe benefits and other economic data, which are decidedly relevant to the choice with which the employees are faced, have had that effect. Where, however, the specific challenged item of propaganda consists of a single inflammatory statement made by one party about the other, it is almost impossible to speculate with any degree of assurance concerning its effect upon that free and unrestrained choice which the law seeks for employees.

Speech in union organizational activity and representation elections has been held to be generally entitled to the

free speech benefits of the First Amendment.[9] It has been persuasively argued that a more reasoned judgment on the part of the employees will rarely, if ever, be promoted by restrictions upon inflammatory speech.[10] It has also been well said that "little virtue will be gained by compelling the parties to be good, nor is there any reason to suppose that Congress intended the representation election as a drill in proper behavior for its own sake."[11]

Nevertheless, inflamnatory statements which "create conditions which make impossible a sober, informed exercise of the franchise" and which are also both not truthful and not germane to the issues legitimately before the employees have caused the Board to invalidate elections. Sewell Manufacturing Co., 138 N.L.R.B. 66, 71-72 (1962). Common sense suggests that employees may think less clearly and rationally, and that the results of an election may thereby be materially influenced, when they are exposed to propaganda of a highly inflammatory nature. Where such propaganda is, in addition, not germane to the issues at stake in the election and consists merely of an irrelevant appeal to the prejudices of the employees, it should be subjected to the most careful scrutiny. N.L.R.B. v. Schapiro & Whitehouse, Inc., 356 F. 2d 675, 678-679 (4th Cir. 1966), in which campaign literature distributed shortly before the election was held so irrelevant and so highly inflammatory as to require the invalidation of the election. Thus, the danger which highly inflammatory and irrelevant propaganda poses to the electoral process may be found to

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[9]Thomas v. Collins, 323 U. S. 516, 537-538, 65 S. Ct. 315, 89 L. Ed. 430 (1945); N.L.R.B. v. Virginia Elec. & Power Co., 314 U. S. 469, 476-477, 62 S. Ct. 344, 86 L. Ed. 348 (1941); Dal-Tex Optical Co., 137 N.L.R.B. 1782, 1787 n. 11 (1962).

[10]D. Bok, *supra* at 67-74.

[11]D. Bok, *supra* at 56.

outweigh the danger posed by the imposition of restrictions upon the content of campaign statements.

We in no way condone the statement contained in the Union handbill of November 5. However, we do not find that the Board has abused its discretion in upholding the Regional Director's refusal to set aside the election here in issue on the basis of that statement. In Paula Shoe Co., 121 N.L.R.B. 673 (1958), a somewhat similar statement was involved, although the statement in that case was made sufficiently early in the pre-election campaign to enable rebuttal. In *Paula,* the employer objected to the following statement which was contained in a Union handbill: "If you want to avoid that the Jew Sandler continue to mistreat you, vote for UTM. * * *" The employer contended that the statement was designed to incite racial and religious prejudice against its plant manager and thus impaired a free choice by the employees in the election. The Board, in overruling the employer's objections to the election, stated:

> The report shows that this statement was the only reference to this issue made in the course of the pre-election campaign. The Board has previously indicated that while it does not condone appeals to prejudice, the mere mention of a racial or religious issue is not grounds for setting aside an election. [121 N.L.R.B. at 676].

The Union's handbill of November 5 in the instant case is an attack upon Mr. Schneider's and the Company's purported lack of concern for the welfare of his employees. The challenged statement is one portion of that attack. As such, the statement is germane to the matters before the employees in the election and cannot be considered as an irrelevant appeal to prejudice. For that reason, particularly in the light of the Union's wide margin of victory in

the election,[12] we hold that the Board did not exceed its discretionary authority in finding that this isolated statement did not constitute an interference with the free and unrestrained choice of the employees.

Four. On November 4 and 5—election eve and election day—the Union sponsored radio broadcasts, the challenged portions of which consisted almost entirely of a repetition of the claims previously made in the Union's handbill of November 2 concerning the Collins & Aikman settlement. The Company in its brief refers to two portions of these broadcasts containing statements which have not already been considered by this Court in connection with the above discussion of the Union handbill of November 2: a claim that during the Collins & Aikman strike the Union had paid all the bills of the striking workers; and a statement that the Collins contract provided for five minutes "wash-up and clean-up" time.

The Board challenges the standing of the Company to raise in this Court any issue connected with these broadcasts, on the ground that such objection was not lodged by the Company with the Regional Director. See N. L. R. B. v. Rexall Chem. Co., 370 F. 2d 363 (1st Cir. 1967).

While we affirm the necessity of raising such timely objections with the Board, we need not here decide whether or not challenges to the radio broadcasts of November 4 and 5 were timely raised by the Company, as it appears clear that the portions of those broadcasts concerning which the Company complains were either repetitions of some of the matters contained in the Union handbill of November 2, or do not involve substantial departures from the truth.[13]

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[12]See note 3, *supra*.

[13]The Union statement during the broadcasts that the Collins contract provided for five minutes "wash-up and clean-up" time, like the claim in the Union handbill of November 2 that the con-

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For the reasons stated, the order of the Board will be enforced.

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tract provided for 15% rest time on all job assignments, was effectively countered by the Company in its handbill of November 4. As for the claim in the radio broadcasts that the Union had paid the bills of the striking workers, that claim had been previously made by the Union in its November 2 handbill and was ruled upon by the Regional Director in the context of the timely objections which the Company filed to the matters contained in that handbill. In his decision the Regional Director stated that "investigation discloses that the Petitioner [the Union] did in fact spend substantial sums in providing strike benefits for the C & A strikers." In view of this finding, which is not challenged by the Company, we do not find that the statement by the Union in the radio broadcasts that the Company paid *all* the bills of the workers while they were on strike involved a substantial departure from the truth, in the absence of a more specific offer by the Company of evidence to the contrary in the unfair labor practice proceeding before the Examiner.

UNITED STATES SUPREME COURT

No. 40

UNIVERSAL CAMERA CORP. *v.* NATIONAL LABOR RELATIONS BOARD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued November 6-7, 1950.
Decided February 26, 1951.

The National Labor Relations Board ordered petitioner to reinstate with back pay an employee found to have been discharged because he gave certain testimony in another proceeding under the National Labor Relations Act. The evidence as to the reason for his discharge was conflicting; and the Board overruled its examiner's findings of fact and his recommendation that the proceedings be dismissed. In decreeing enforcement, the Court of Appeals held that the Board's findings of fact were "supported by substantial evidence on the record considered as a whole" within the meaning of § 10(e) of the National Labor Relations Act, as amended in 1947. This holding was based partly on the view (1) that the 1947 amendments had not broadened the scope of judicial review, and (2) that the Board's rejection of its examiner's findings of fact was without relevance in determining whether the Board's findings were supported by substantial evidence. *Held:*

1. In the light of the legislative history, the standard of proof required under § 10(e) of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947, to support a decision of the Labor Board on judicial review is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act. Pp. 477-487.

2. In amending § 10(e) of the National Labor Relations Act so as to require that, on judicial review, the Board's findings of fact must be supported by substantial evidence "on the record considered as a whole," Congress made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view. Pp. 487-488.

3. When read in the light of their legislative history, the Administrative Procedure Act and the Labor Management Relations Act, 1947, require the courts to assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Pp. 488-490.

4. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the courts of appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. P. 491.

5. The Court of Appeals erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board. Pp. 491-497.

(a) A trial examiner's findings are not as unassailable as a master's and may be reversed by the Board even when not clearly erroneous. P. 492.

(b) A reviewing court need not give a trial examiner's findings more weight than in reason and in the light of judicial experience they deserve; but they should be accorded the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial. Pp. 496-497.

6. The cause is remanded to the Court of Appeals, which is left free to grant or deny enforcement as it thinks the principles expressed in the opinion of this Court dictate. P. 497.

179 F. 2d 749, vacated and remanded.

The Court of Appeals decreed enforcement of an order of the National Labor Relations Board requiring petitioner to reinstate an employee with back pay and to cease and desist from discriminating against any employee who files charges or gives testimony under the National Labor Relations Act. 179 F. 2d 749. This Court granted certiorari. 339 U. S. 962. *Judgment vacated and cause remanded*, p. 497.

By special leave of Court, *Frederick R. Livingston, pro hac vice*, argued the cause for petitioner. With him on the brief was *James S. Hays*.

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Solicitor General Perlman*, *David P. Findling* and *Bernard Dunau*.

Mr. Justice Frankfurter delivered the opinion of the Court.

The essential issue raised by this case and its companion, *Labor Board* v. *Pittsburgh Steamship Co.*, *post*, p. 498, is the effect of the Administrative Procedure Act and the

legislation colloquially known as the Taft-Hartley Act on the duty of Courts of Appeals when called upon to review orders of the National Labor Relations Board.

The Court of Appeals for the Second Circuit granted enforcement of an order directing, in the main, that petitioner reinstate with back pay an employee found to have been discharged because he gave testimony under the Wagner Act and cease and desist from discriminating against any employee who files charges or gives testimony under that Act. The court below, Judge Swan dissenting, decreed full enforcement of the order. 179 F. 2d 749. Because the views of that court regarding the effect of the new legislation on the relation between the Board and the Courts of Appeals in the enforcement of the Board's orders conflicted with those of the Court of Appeals for the Sixth Circuit[1] we brought both cases here. 339 U. S. 951 and 339 U. S. 962. The clash of opinion obviously required settlement by this Court.

I.

Want of certainty in judicial review of Labor Board decisions partly reflects the intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review. But in part doubts as to the nature of the reviewing power and uncertainties in its

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[1] *Labor Board* v. *Pittsburgh Steamship Co.*, 180 F. 2d 731, affirmed, *post*, p. 498. The Courts of Appeals of five circuits have agreed with the Court of Appeals for the Second Circuit that no material change was made in the reviewing power. *Eastern Coal Corp.* v. *Labor Board*, 176 F. 2d 131, 134-136 (C. A. 4th Cir.); *Labor Board* v. *La Salle Steel Co.*, 178 F. 2d 829, 833-834 (C. A. 7th Cir.); *Labor Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 325-326 (C. A. 8th Cir.); *Labor Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A. 10th Cir.); *Labor Board* v. *Booker*, 180 F. 2d 727, 729 (C. A. 5th Cir.); but see *Labor Board* v. *Caroline Mills, Inc.*, 167 F. 2d 212, 213 (C. A. 5th Cir.).

application derive from history, and to that extent an elucidation of this history may clear them away.

The Wagner Act provided: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Act of July 5, 1935, § 10(e), 49 Stat. 449, 454, 29 U.S.C. § 160(e). This Court read "evidence" to mean "substantial evidence," *Washington, V. & M. Coach Co.* v. *Labor Board*, 301 U. S. 142, and we said that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229. Accordingly, it "must do more than create a suspicion of the existence of the fact to be established. . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300.

The very smoothness of the "substantial evidence" formula as the standard for reviewing the evidentiary validity of the Board's findings established its currency. But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was "substantial," the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was "substantial" when considered by itself. It is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings. Compare *Labor Board*

v. *Waterman Steamship Corp.*, 309 U. S. 206; *Labor Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; and see *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. This is not to say that every member of this Court was consciously guided by this view or that the Court ever explicitly avowed this practice as doctrine. What matters is that the belief justifiably arose that the Court had so construed the obligation to review.[2]

Criticism of so contracted a reviewing power reinforced dissatisfaction felt in various quarters with the Board's administration of the Wagner Act in the years preceding the war. The scheme of the Act was attacked as an inherently unfair fusion of the functions of prosecutor and judge.[3] Accusations of partisan bias were not wanting.[4] The "irresponsible admission and weighing of hearsay, opinion, and emotional speculation in place of factual evidence" was said to be a "serious menace."[5] No doubt some, perhaps even much, of the criticism was baseless and some

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[2]See the testimony of Dean Stason before the Subcommittee of the Senate Committee on the Judiciary in 1941. Hearings on S. 674, 77th Cong., 1st Sess. 1355-1360.

[3]See, for example, the remarks of Laird Bell, then Chairman of the Committee on Administrative Law of the Chicago Bar Association, writing in 1940 in the American Bar Association Journal. 26 A. B. A. J. 552.

[4]See Gall, The Current Labor Problem: The View of Industry, 27 Iowa L. Rev. 381, 382.

[5]This charge was made by the majority of the Special Committee of the House appointed in 1939 to investigate the National Labor Relations Board. H. R. Rep. No. 1902, 76th Cong., 3d Sess. 76.

surely was reckless.[6] What is here relevant, however, is the climate of opinion thereby generated and its effect on Congress. Protests against "shocking injustices"[7] and intimations of judicial "abdication"[8] with which some courts granted enforcement of the Board's orders stimulated pressures for legislative relief from alleged administrative excesses.

The strength of these pressures was reflected in the passage in 1940 of the Walter-Logan Bill. It was vetoed by President Roosevelt, partly because it imposed unduly rigid limitations on the administrative process, and partly because of the investigation into the actual operation of the administrative process then being conducted by an experienced committee appointed by the Attorney General.[9] It is worth noting that despite its aim to tighten control over administrative determinations of fact, the Walter-Logan Bill contended itself with the conventional formula that an

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[6]Professor Gellhorn and Mr. Linfield reached the conclusion in 1939 after an extended investigation that "the denunciations find no support in fact." Gellhorn and Linfield, Politics and Labor Relations, 39 Col. L. Rev. 339, 394. See also Millis and Brown, From the Wagner Act to Taft-Hartley, 66-75.

[7]*Wilson & Co.* v. *Labor Board*, 126 F. 2d 114, 117.

[8]In *Labor Board* v. *Standard Oil Co.*, 138 F. 2d 885, 887, Judge Learned Hand said, "We understand the law to be that the decision of the Board upon that issue is for all practical purposes not open to us at all; certainly not after we have once decided that there was 'substantial' evidence that the 'disestablished' union was immediately preceded by a period during which there was a 'dominated' union. . . .

"[W]e recognize how momentous may be such an abdication of any power of review . . . ."

[9]86 Cong. Rec. 13942-13943, reprinted as H. R. Doc. No. 986, 76th Cong., 3d Sess.

agency's decision could be set aside if "the findings of fact are not supported by substantial evidence."[10]

The final report of the Attorney General's Committee was submitted in January, 1941. The majority concluded that "[d]issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies."[11] Departure from the "substantial evidence" test, it thought, would either create unnecessary uncertainty or transfer to courts the responsibility for ascertaining and assaying matters the significance of which lies outside judicial competence. Accordingly, it recommended against legislation embodying a general scheme of judicial review.[12]

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[10]S. 915, H. R. 6324, 76th Cong., 1st Sess., § 5 (a).

[11]Final Report, 92.

[12]Referring to proposals to enlarge the scope of review to permit inquiry whether the findings are supported by the weight of the evidence, the majority said:

"Assuming that such a change may be desirable with respect to special administrative determinations, there is serious objection to its adoption for general application.

"In the first place there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between 'substantial evidence' and 'weight of evidence' is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. 'Substantial evidence' may well be equivalent to the 'weight of evidence' when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided.

"In the second place the wisdom of a general change to review of the 'weight of evidence' is questionable. If the change would

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Three members of the Committee registered a dissent. Their view was that the "present system or lack of system of judicial review" led to inconsistency and uncertainty. They reported that under a "prevalent" interpretation of the "substantial evidence" rule "if what is called 'substantial evidence' is found anywhere in the record to support conclusions of fact, the courts are said to be obliged to sustain the decision without reference to how heavily the countervailing evidence may preponderate—unless indeed the stage of arbitrary decision is reached. Under this interpretation, the courts need to read only one side of the case and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary is to be ignored."[13] Their view led them to recommend that Congress enact principles of review applicable to all agencies not excepted by unique characteristics. One of these principles was expressed by the formula that judicial review could extend to "findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence."[14] So far as the history of this movement for

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require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications." Final Report, 91-92.

[13]*Id.*, 210-211.

[14]The minority enumerated four "existing deficiencies" in judicial review. These were (1) "the haphazard, uncertain, and variable results of the present system or lack of system of judicial review," (2) the interpretation permitting substantiality to be determined without taking into account conflicting evidence, (3) the failure of existing formulas "to take account of differences

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enlarged review reveals, the phrase "upon the whole record" makes its first appearance in this recommendation of the minority of the Attorney General's Committee. This evidence of the close relationship between the phrase and the criticism out of which it arose is important, for the

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between the various types of fact determinations," and (4) the practice of determining standards of review by "case-to-case procedure of the courts." They recommended that

"Until Congress finds it practicable to examine into the situation of particular agencies, it should provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability. As the Committee recognizes in its report, there are several principal subjects of judicial review—including constitutional questions, statutory interpretation, procedure, and the support of findings of fact by adequate evidence. The last of these should, obviously we think, mean support of all findings of fact, including inferences and conclusion of fact, upon the *whole* record. Such a legislative provision should, however, be qualified by a direction to the courts to respect the experience, technical competence, specialized knowledge, and discretionary authority of each agency. We have framed such a provision in the appendix to this statement." *Id.*, 210-212.

The text of the recommended provision is as follows:

"(e) *Scope of review.*—As to the findings, conclusions, and decisions in any case, the reviewing court, regardless of the form of the review proceeding, shall consider and decide so far as necessary to its decision and where raised by the parties, all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious. *Provided, however,* That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it." *Id.*, 246-247.

substance of this formula for judicial review found its way into the statute books when Congress with unquestioning—we might even say uncritical—unanimity enacted the Administrative Procedure Act.[15]

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[15]60 Stat. 237, 5 U. S. C. § 1001 *et seq.* The form finally adopted reads as follows:

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

. . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243-244, 5 U. S. C. § 1009 (e). (Italics ours.)

In the form in which the bill was originally presented to Congress, clause (B)(5) read, "unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8." H. R. 1203, 79th Cong., 1st Sess., quoted in S. Doc. No. 248, 79th Cong., 2d Sess. 155, 160. References to competency and materiality of evidence were deleted and the final sentence added by the Senate Committee. S. Rep. No. 752, 79th Cong., 1st Sess. 28; S. Doc. No. 248, *supra*, 39-40, 214. No reason was given for the deletion.

One is tempted to say "uncritical" because the legislative history of that Act hardly speaks with that clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will. On the one hand, the sponsors of the legislation indicated that they were reaffirming the prevailing "substantial evidence" test.[16] But with equal clarity they expressed disapproval of the manner in which the courts were applying their own standard. The committee reports of both houses refer to the practice of agencies to rely upon "suspicion, surmise, implications, or plainly incredible evidence," and indicate that courts are to exact higher standards "in the exercise of their independent judgment" and on consideration of "the whole record."[17]

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[16]A statement of the Attorney General appended to the Senate Report explained that the bill "is intended to embody the law as declared, for example, in *Consolidated Edison Co.* v. *National Labor Relations Board* (305 U. S. 197)." Section 10(e) of Appendix B to S. Rep. No. 752, *supra*, reprinted in S. Doc. No. 248, *supra*, 230. Mr. McFarland, then Chairman of the American Bar Association Committee on Administrative Law, testified before the House Judiciary Committee to the same effect. *Id.*, 85-86.

[17]The following quotation from the report of the Senate Judiciary Committee indicates the position of the sponsors. "The 'substantial evidence' rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and

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Similar dissatisfaction with too restricted application of the "substantial evidence" test is reflected in the legislative history of the Taft-Hartley Act.[18] The bill as reported to the House provided that the "findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence."[19] The bill left the House with this provision. Early committee prints in the Senate provided for review by "weight of the evidence" or "clearly erroneous" standards.[20] But, as the Senate Committee Report relates, "it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails. In order to clarify any

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the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required." S. Rep. No. 752, *supra*, 30-31. The House Committee Report is to substantially the same effect. H. R. Rep. No. 1980, 79th Cong., 2d Sess. 45. The reports are reprinted in S. Doc. No. 248, *supra*, 216-217, 279.

See also the response of Senator McCarran in debate, to the effect that the bill changed the "rule" that courts were "powerless to interfere" when there "was no probative evidence." *Id.*, 322. And see the comment of Congressman Springer, a member of the House Judiciary Committee, *id.*, 376.

[18]61 Stat. 136, 29 U. S. C. (Supp. III) § 141 *et seq.*

[19]H. R. 3020, 80th Cong., 1st Sess., § 10(e), reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, p. 71.

[20]The history of the evolution of the Senate provision was given by Senator Morse. 93 Cong. Rec. 5108, reprinted in 2 Legislative History 1504-1505. The prints were not approved by the Committee.

ambiguity in that statute, however, the committee inserted the words 'questions of fact, if supported by substantial evidence *on the record considered as a whole* . . . .' "[21]

This phraseology was adopted by the Senate. The House conferees agreed. They reported to the House: "It is believed that the provisions of the conference agreement relating to the courts' reviewing power will be adequate to preclude such decisions as those in *N. L. R. B.* v. *Nevada Consol. Copper Corp.* (316 U. S. 105) and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation,* and *Le Tourneau,* etc. cases, *supra,* without unduly burdening the courts."[22] The Senate version became the law.

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[21]S. Rep. No. 105, 80th Cong., 1st Sess. 26-27, reprinted in 1 Legislative History 432-433. The Committee did not explain what the ambiguity might be; and it is to be noted that the phrase it italicized is indistinguishable in content from the requirement of § 10(e) of the Administrative Procedure Act that "the court shall review the whole record or such portions thereof as may be cited by any party . . . ."

Senator Taft gave this explanation to the Senate of the meaning of the section: "In the first place, the evidence must be substantial; in the second place, it must still look substantial when viewed in the light of the entire record. That does not go so far as saying that a decision can be reversed on the weight of the evidence. It does not go quite so far as the power given to a circuit court of appeals to review a district-court decision, but it goes a great deal further than the present law, and gives the court greater opportunity to reverse an obviously unjust decision on the part of the National Labor Relations Board." 93 Cong. Rec. 3839, reprinted in 2 Legislative History 1014.

[22]H. R. Rep. No. 510, 80th Cong., 1st Sess. 56, reprinted in 1 Legislative History 560. In *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 107, we reversed a judgment refusing to enforce a Board order because "upon an examination of the record we cannot say that the findings of fact of the Board are

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It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it

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without support in the evidence." The sufficiency of evidence to support findings of fact is not involved in the three other decisions of this Court to which reference was made. *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *Republic Aviation Corp.* v. *Labor Board* and *Labor Board* v. *Le Tourneau Co.*, 324 U. S. 793. The language used by the court offers a probable explanation for including two of the decisions of Courts of Appeals. In *Wilson & Co.* v. *Labor Board*, 126 F. 2d 114, 117, the Court of Appeals for the Seventh Circuit sustained a finding that the employer dominated a company union after stating that it had "recognized (or tried to) that findings must be sustained, even when they are contrary to the great weight of the evidence, and we have ignored, or at least endeavored to ignore, the shocking injustices which such findings, opposed to the overwhelming weight of the evidence, produce." *Labor Board* v. *Columbia Products Corp.*, 141 F. 2d 687, 688, is a *per curiam* decision of the Court of Appeals for the Second Circuit sustaining a finding of discriminatory discharge. The court said of the Board's decision on a question of fact, "Though it may strain our credulity, if it does not quite break it down, we must accept it . . . ." The reason for disapproval of *Labor Board* v. *Union Pacific Stages*, 99 F. 2d 153, is not apparent. The Court of Appeals for the Ninth Circuit there enforced the portion of the Board's order directing the company to disavow a policy of discrimination against union members, on the ground that there appeared "to be evidence, although disputed," that some company officials had discouraged employees from joining. 99 F. 2d at 179. The bulk of the lengthy opinion, however, is devoted to a discussion of the facts to support the court's conclusion that the Board's findings of discriminatory discharges should not be sustained.

is not for us to question that Congress may assume such qualities in the federal judiciary.

From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a Court of Appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee

demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

To be sure, the requirement for canvassing "the whole record" in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

There remains, then, the question whether enactment of these two statutes has altered the scope of review other than to require that substantiality be determined in the light of all that the record relevantly presents. A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.

Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms.

Whatever changes were made by the Administrative Procedure and Taft-Hartley Acts are clearly within this area where precise definition is impossible. Retention of the familiar "substantial evidence" terminology indicates that no drastic reversal of attitude was intended.

But a standard leaving an unavoidable margin for individual judgment does not leave the judicial judgment at large even though the phrasing of the standard does not wholly fence it in. The legislative history of these Acts demonstrates a purpose to impose on courts a responsibility which has not always been recognized. Of course it is a statute and not a committee report which we are interpreting. But the fair interpretation of a statute is often "the art of proliferating a purpose," *Brooklyn National Corp.* v. *Commissioner,* 157 F. 2d 450, 451, revealed more by the demonstrable forces that produced it than by its precise phrasing. The adoption in these statutes of the judicially-constructed "substantial evidence" test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atomsphere which may have favored those decisions.

We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

From this it follows that enactment of these statutes does not require every Court of Appeals to alter its practice. Some—perhaps a majority—have always applied the attitude reflected in this legislation. To explore whether a particular court should or should not alter its practice would only divert attention from the application of the standard now prescribed to a futile inquiry into the nature of the test formerly used by a particular court.

Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

II.

Our disagreement with the view of the court below that the scope of review of Labor Board decisions is unaltered by recent legislation does not of itself, as we have noted, require reversal of its decision. The court may have applied a standard of review which satisfies the present Congressional requirement.

The decision of the Court of Appeals is assailed on two grounds. It is said (1) that the court erred in holding that it was barred from taking into account the report of the examiner on questions of fact insofar as that report was rejected by the Board, and (2) that the Board's order was not supported by substantial evidence on the record considered as a whole, even apart from the validity of the court's refusal to consider the rejected portions of the examiner's report.

The latter contention is easily met. It is true that two of the earlier decisions of the court below were among those disapproved by Congress.[23] But this disapproval, we have seen, may well have been caused by unintended intimations of judicial phrasing. And in any event, it is clear from the court's opinion in this case that it in fact did consider the "record as a whole," and did not deem itself merely the judicial echo of the Board's conclusion. The testimony of the company's witnesses was inconsistent, and there was clear evidence that the complaining employee had been discharged by an officer who was at one time influenced against him because of his appearance at the Board hearing. On such a record we could not say that it would be error to grant enforcement.

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[23] *Labor Board* v. *Standard Oil Co.*, 138 F. 2d 885; *Labor Board* v. *Columbia Products Corp.*, 141 F. 2d 687. See notes 8 and 22, *supra*.

The first contention, however, raises serious questions to which we now turn.

III.

The Court of Appeals deemed itself bound by the Board's rejection of the examiner's findings because the court considered these findings not "as unassailable as a master's."[24] 179 F. 2d at 752. They are not. Section 10(c) of the Labor Management Relations Act provides that "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact . . . ." 61 Stat. 147, 29 U.S.C. (Supp. III) § 160(c). The responsibility for decision thus placed on the Board is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are "clearly erroneous." Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

The Court of Appeals concluded from this premise "that, although the Board would be wrong in totally disregarding his findings, it is practically impossible for a court, upon review of those findings which the Board itself substitutes, to consider the Board's reversal as a factor in

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[24]Rule 53(e)(2), Fed. Rules Civ. Proc., gives finality to the findings of a master unless they are clearly erroneous.

The court's ruling excluding from consideration disagreement between the Board and the examiner was in apparent conflict with the views of three other circuits. *Labor Board* v. *Ohio Calcium Co.*, 133 F. 2d 721, 724 (C. A. 6th Cir.); *A. E. Staley Mfg. Co.* v. *Labor Board*, 117 F. 2d 868, 878 (C. A. 7th Cir.); *Wilson & Co.* v. *Labor Board*, 123 F. 2d 411, 418 (C. A. 8th Cir.); cf. *International Assn. of Machinists* v. *Labor Board*, 71 App. D. C. 175, 180, 110 F. 2d 29, 34 (C. A. D. C. Cir.).

the court's own decision. This we say, because we cannot find any middle ground between doing that and treating such a reversal as error, whenever it would be such, if done by a judge to a master in equity." 179 F. 2d at 753. Much as we respect the logical acumen of the Chief Judge of the Court of Appeals, we do not find ourselves pinioned betwen the horns of his dilemma.

We are aware that to give the examiner's findings less finality than a master's and yet entitle them to consideration in striking the account, is to introduce another and an unruly factor into the judgmatical process of review. But we ought not to fashion an exclusionary rule merely to reduce the number of imponderables to be considered by reviewing courts.

The Tart-Hartley Act provides that "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 61 Stat. 148, 29 U.S.C. (Supp. III) § 160(e). Surely an examiner's report is as much a part of the record as the complaint or the testimony. According to the Administrative Procedure Act, "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record . . . ." § 8(b), 60 Stat. 242, 5 U.S.C. § 1007(b). We found that this Act's provision for judicial review has the same meaning as that in the Taft-Hartley Act. The similarity of the two statutes in language and purpose also requires that the definition of "record" found in the Administrative Procedure Act be construed to be applicable as well to the term "record" as used in the Taft-Hartley Act.

It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report. The conclusion is confirmed by the indications in the legislative history that enhance-

ment of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

This aim was set forth by the Attorney General's Committee on Administrative Procedure:

> "In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."[25]

Apparently it was the Committee's opinion that these recommendations should not be obligatory. For the bill which accompanied the Final Report required only that hearing officers make an initial decision which would become final in the absence of further agency action, and that agencies which differed on the facts from their examiners give reasons and record citations supporting their conclusion.[26] This proposal was further moderated by the Administrative Procedure Act. It permits agencies to use examiners to record testimony but not to evaluate it, and contains the rather obscure provision that an agency which reviews an examiner's report has "all the powers which it would have in making the initial decision."[27]

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[25]Final Report, 51.

[26]§§ 308(1) and 309(2) of the proposed bill, quoted in Final Report, 200, 201.

[27]§ 8(a), 60 Stat. 242, 5 U. S. C. § 1007(a). The quoted provision did not appear in the bill in the form in which it was intro-

(Footnote Continued on Next Page)

But this refusal to make mandatory the recommendations of the Attorney General's Committee should not be construed as a repudiation of them. Nothing in the statutes suggests that the Labor Board should not be influenced by the examiner's oportunity to observe the witnesses he hears and sees and the Board does not. Nothing suggests that reviewing courts should not give to the examiner's report such probative force as it intrinsically commands. To the contrary, § 11 of the Administrative Procedure Act contains detailed provisions designed to maintain high standards of independence and competence in examiners. Section 10(c) of the Labor Management Relations Act requires that examiners "shall issue . . . a proposed report, together with a recommended order." Both statutes thus evince a purpose to increase the importance of the role of examiners in the administrative process. High standards of public administration counsel that we attribute to the Labor Board's examiners both due regard for the responsi-

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(Footnote Continued From Preceding Page)

duced into the Senate. S. 7, 79th Cong., 1st Sess., § 7. It was added by the Senate Judiciary Committee. The Committee published its reasons for modifying the earlier draft, but gave no explanation for this particular change. See S. Doc. No. 248, *supra*, 32-33. It is likely that the sentence was intended to embody a clause in the draft prepared by the Attorney General's Committee, which provided that on review of a case decided initially by an examiner an agency should have jurisdiction to remand or to "affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper upon the record." § 309(2), Final Report, 201. The substance of this recommendation was included in bills introduced into the House. H. R. 184, 79th Cong., 1st Sess., § 309(2), and H. R. 339, 79th Cong., 1st Sess., § 7(c), both quoted in S. Doc. No. 248, *supra*, 138, 143.

bility which Congress imposes on them and the competence to discharge it.[28]

The committee reports also make it clear that the sponsors of the legislation thought the statutes gave significance to the findings of examiners. Thus, the Senate Committee responsible for the Administrative Procedure Act explained in its report that examiners' decisions "would be of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing."[29] The House Report reflects the same attitude;[30] and the Senate Committee Report on the Taft-Hartley Act likewise indicates regard for the responsibility devolving on the examiner.[31]

We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same

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[28]Salaries of trial examiners range from $7,600 to $10,750 per year. See Appendix to the Budget of the United States Government for the fiscal year ending June 30, 1952, p. 47.

[29]S. Rep. No. 752, *supra*, 24, reproduced in S. Doc. No. 248, *supra*, 210.

[30]H. R. Rep. No. 1980, 79th Cong., 2d Sess. 38-39, reprinted in S. Doc. No. 248, *supra*, 272-273. The House Report added that "In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill." The language of the statute offers no support for this statement.

[31]S. Rep. No. 105, 80th Cong., 1st Sess. 9, quoted in 1 Legislative History of the Labor Management Relations Act, 1947, p. 415.

conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is "substantial."

The direction in which the law moves is often a guide for decision of particular cases, and here it serves to confirm our conclusion. However halting its progress, the trend in litigation is toward a rational inquiry into truth, in which the tribunal considers everything "logically probative of some matter requiring to be proved." Thayer, A Preliminary Treatise on Evidence, 530; *Funk* v. *United States,* 290 U. S. 371. This Court has refused to accept assumptions of fact which are demonstrably false, *United States v. Provident Trust Co.,* 291 U. S. 272, even when agreed to by the parties, *Swift & Co.* v. *Hocking Valley R. Co.,* 243 U. S. 281. Machinery for discovery of evidence has been strengthened; the boundaries of judicial notice have been slowly but perceptibly enlarged. It would reverse this process for courts to deny examiners' findings the probative force they would have in the conduct of affairs outside a courtroom.

We therefore remand the cause to the Court of Appeals. On reconsideration of the record it should accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's order is substantial. But the court need not limet its reexamination of the case to the effect of that report on its decision. We leave it free to grant or deny enforcement as it thinks the principles expressed in this opinion dictate.

Judgment vacated and cause remanded.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concur with parts I and II of this opinion but as to part III agree with the opinion of the court below, 179 F. 2d 749, 753.

Supreme Court, U.S.
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No. 87-179

In the Supreme Court of the United States

OCTOBER TERM, 1987

TONY SCOTT TRUCKING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board erred in finding that the Union did not impermissibly interfere with the free choice of petitioner's employees in their selection of a bargaining representative and therefore that petitioner violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by refusing to bargain with the Union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 821 F.2d 312. The decision and order of the National Labor Relations Board (Pet. App. 11a-19a) are reported at 277 N.L.R.B. No. 155. The decision and order of certification of the National Labor Relations Board (Pet. App. 20a-21a), and the hearing officer's report on the objections to the election (Pet. App. 22a-35a), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1987. A petition for a writ of certiorari was filed on July 27, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, Tony Scott Trucking, Inc., hauls materials, supplies, and equipment for use by other companies in road construction work (Pet. App. 13a). On July 11, 1984, the General Drivers, Warehousemen and Helpers, Local No. 89, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), filed a petition with the National Labor Relations Board seeking certification as the exclusive bargaining representative of a stipulated unit of drivers and mechanics employed at petitioner's Bowling Green, Kentucky, facility (*id.* at 2a, 22a). On September 6, 1984, the Board conducted a secret ballot election among the employees in the unit, a majority of whom voted in favor of representation by the Union (*ibid.*). Petitioner responded with timely filed objections to the election, alleging that the Union had impermissibly interfered with the employees' free choice by offering to waive initiation fees for those employees who signed authorization cards before the election and by attempting to intimidate employees who intended to vote against union representation (through threats of physical harm, racial slurs, and false accusations of criminal wrongdoing) (*id.* at 2a, 28a-29a).

At the hearing held to resolve these objections, petitioner relied almost exclusively on the testimony of two employees—Roger Curry and Jimmy Hudson. Curry testified (Pet. App. 24a) that, approximately one week after the Union filed its representation petition, another unit employee, Lewis Burton, told him that "if he did not sign [an authorization] card, it would cost him $150 and if he did it would cost him $10," and that, on another occasion, yet another unit employee, Jimmy Burton, asked him to sign an au-

thorization card and told him that it "would come out cheaper if he signed a card." Hudson testified that, while he was working on a truck at petitioner's shop one day, he heard some drivers say to each other that those employees who "did not sign a card now would have to pay $100 later on" (*ibid.*). Finally, Curry, who is black, testified that, after he refused to sign an authorization card, he began hearing racial "slurs" over the CB radio in his truck (*id.* at 6a); that he overheard two other unit employees discussing the need to "get rid of the nigger" and to bring in the "Ku Klux Klan in Louisville" to "do away with [him]" (*id.* at 6a-7a); that he found the words "nigger sucks Scotty" written in the dust on the ticket box where he picked up the papers for his load (*id.* at 7a); that a bag of marijuana had been planted in his truck (*ibid.*); and that another employee named Tom Cox had warned him not to vote in the election at all if he did not intend to vote for the Union (*ibid.*).

Much of this testimony was contradicted or undermined, however, by other statements that Curry and Hudson made or by the testimony of other witnesses. For example, in response to a question of the hearing officer, Curry testified that "no one had told him it would be cheaper to sign a card now as opposed to later" (Pet. App. 25a), and that only "Lewis Burton [had] made comments to him about how much it would cost" to sign an authorization card (*ibid.*). Moreover, Curry testified that no racial "slurs" had been directed to him personally (*id.* at 29a), that the substance found in his truck had never been confirmed by tests to be marijuana (*id.* at 7a, 31a), that the incident was never reported to the police (*ibid.*), and that he had voted in the secret ballot election (*id.* at 34a). Hudson, in turn, testified that he could not

identify the individuals in the shop who allegedly had said that initiation fees would be waived for employees signing cards and that no one had ever asked him to sign an authorization card (*id.* at 5a). Finally, Lewis Burton denied having made any of the statements attributed to him by Curry (*ibid.*); Jimmy Burton and Tom Cox denied that Lewis Burton had said anything to them about a waiver of initiation fees (*ibid.*); Jimmy Burton denied having made the statements attributed to him by Curry (*ibid.*); and Charles Priddy, an assistant president of the Union, testified that he had conducted only two official meetings during the organizational campaign, that he had told attendees of these meetings that dues and fees would be the same for all employees whether they signed authorization cards or not, and that he had never authorized any employee to speak for or otherwise to represent the Union (*id.* at 5a, 25a).

2. Based on this testimony and the demeanor of the witnesses, the hearing officer rejected petitioner's objections to the election (Pet. App. 22a-35a). The hearing officer found that, in contrast to Priddy's testimony, Curry's testimony about the statements allegedly made concerning the cost of joining the union was "contradictory," "confused" and "less than credible" (*id.* at 25a).[1] She similarly found that

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[1] Moreover, she found (Pet. App. 26a-28a) that, "[e]ven if * * * [Curry's] testimony [as to a waiver offer] were credited," there was no evidence that any of the alleged statements concerning the cost of joining the union were made by agents of the union; to the contrary, she found that the union had "clearly stated its valid policy regarding initiation fees" and therefore that, in any event, the alleged statements by Lewis and Jimmy Burton were not sufficient ground for overturning the results of the election.

Curry's testimony concerning the threats and racial slurs he allegedly heard over his CB radio was not credible (*id.* at 31a-33a). In any event, she concluded that the alleged threats were " 'not of such [a] nature as would have tended to make a free election improbable' " (*id.* at 33a);[2] that petitioner's remaining allegations of objectionable conduct were "too trivial and speculative to warrant serious consideration" (*ibid.*);[3] and that, "[w]hile the use of [racial slurs] * * * is not commendable, it is common and there was no testimony that any 'slurs' were ever linked directly to any employee's support for or opposition to the * * * [Union]" (*ibid.*). Thus, she con-

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[2] The hearing officer noted (Pet. App. 32a) that the alleged threat was isolated, remote in time from the election, and outside the " 'critical period' " between the filing of the petition and the casting of votes by the employees. She further noted (*ibid.*) that the alleged threat was never reported to the police and that there was no evidence that petitioner "had ever attempted to discipline or restrain" the alleged participants. She also noted (*id.* at 32a-33a) that the alleged threat was not made in person, did not refer to Curry by name, and was not communicated to other employees. Finally, she emphasized (*id.* at 33a) that there was no testimony by Curry or anyone else linking the threat to the union's organizing drive and that Curry had testified that it "did not discourage him from openly voicing his opposition to the Union or from voting."

[3] The hearing officer said (Pet. App. 33a) that it was "ridiculous" to suggest that the union "could be found responsible for a substance, which was never conclusively identified as marijuana, being planted in Curry's truck." Moreover, she credited (*id.* at 33a) the representations of Cox and Burton that they had not placed the alleged marijuana in Curry's truck. Finally, she found (*id.* at 34a) that Cox's alleged statement to Curry that he should not vote at all unless he intended to vote for the union "does not constitute objectionable conduct."

cluded that the "pre-election conduct which was established by * * * [petitioner] could not have realistically created an atmosphere requiring the election to be set aside" and recommended that the Board overrule petitioner's objections and certify the Union (*id.* at 34a).

3. On review of petitioner's exceptions, the Board adopted the hearing officer's findings and issued the recommended certification (Pet. App. 20a-21a).[4] But petitioner refused to bargain with the Union (*id.* at 2a). Accordingly, the General Counsel issued a complaint alleging that petitioner had violated Sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and 158(a)(1), by its refusal to bargain (Pet. App. 2a). On motion for summary judgment, the Board found that petitioner had indeed committed the alleged violations and directed petitioner to bargain with the Union on request (*id.* at 12a-16a).

4. In a per curiam opinion, the court of appeals affirmed the Board's decision and enforced its order (Pet. App. 1a-10a). Initially, the court stated that "'[t]he only question presented on judicial review is whether the Board has reasonably exercised its discretion in the matter'" (Pet. App. 3a (citation omitted)) and that, in resolving this issue, "[t]he Board's findings of fact are conclusive 'if supported by substantial evidence on the record considered as a whole'" (*ibid.*, quoting 29 U.S.C. 160(e)). It then turned to the record and found that, since "[t]he hearing officer was faced with conflicting [evidence] as to whether an offer of a waiver of initiation fees

[4] The Board upheld the hearing examiner's credibility findings and found "it unnecessary to pass on [her] alternative discussion based on her agency findings" (Pet. App. 20a n.1).

had been made," "the Board's finding that no offer to waive initiation fees was made is supported by substantial evidence" and deserving of judicial deference (Pet. App. 6a).[5] And it further agreed with the Board's finding that petitioner had failed "to prove that the coercive acts actually occurred"[6] or that "these acts interfered with the employees' choice and affected the outcome of the election" (*id.* at 9a).[7] Accordingly, it held that "[t]he Board's conclusion that the election should not be set aside is supported by substantial evidence" and granted the petition for enforcement (*id.* at 10a).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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[5] Like the Board, the court of appeals saw no need to determine whether the employees who had allegedly said that initiation fees would be waived for employees signing authorization cards or who had allegedly threatened other employees were agents of the Union (Pet. App. 6a).

[6] The court reviewed the conflicting testimony concerning the allegedly coercive or intimidating acts and observed that "[t]he hearing officer, who heard testimony on both sides of the issue, chose not to credit Curry's testimony" (Pet. App. 9a). The court found the hearing officer's conclusion to be reasonable "[i]n light of the fact that no one corroborated Curry's testimony or heard what Curry claimed was said" (*ibid.*).

[7] The court noted (Pet. App. 9a) that "Curry himself, the supposed target of these alleged threats, testified that on election day he 'just walked in and voted,' [and] [n]o other employee testified that his or her vote was affected by these alleged threats."

1. It is settled law that the Board has a "wide degree of discretion" in its regulation of the conduct of representation elections. *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946). It is further settled that the Board will set aside an election decision only where the objecting party shows by specific evidence both that improper conduct has occurred and that the atmosphere created has so impeded the employees' free choice that the result of the election was materially affected. See *NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961). In this case, the court below found substantial evidence to support the Board's conclusion that most of the union misconduct alleged by petitioner did not in fact occur; that is, the record supported the Board's findings that the Union had not offered to waive initiation fees for employees who signed authorization cards and that the Union had not threatened employee Curry with retaliation for his pro-company stance or planted marijuana in Curry's truck. The court of appeals also found substantial support for the Board's conclusion that the remaining conduct alleged to be objectionable—*i.e.*, racial "slurs" not directly linked to the election campaign and Cox's statement to Curry that he should not vote at all unless he voted for the union—did not create an atmosphere that could realistically be viewed as interfering with employee free choice. Accordingly, the court below correctly affirmed the Board's exercise of its "wide discretion" in refusing to set aside the results of this election.

2. Petitioner contends (Pet. 7-12) that this Court should grant certiorari to resolve a conflict among the circuits concerning whether the Board's decisions in election certification cases should be judged by the

" 'substantial evidence' " or " 'abuse of discretion' " standard. There is no merit to this contention.

Initially, we note that the matter on which the courts of appeals differ is much narrower than petitioner suggests. The courts uniformly hold that the rules that the Board has devised for regulating the conduct of representation elections should be judged under the "abuse of discretion" standard. See, *e.g.*, *NLRB* v. *A.J. Tower Co.*, 329 U.S. at 330; *NLRB* v. *L & J Equipment Co.*, 745 F.2d 224, 230-231 (3d Cir. 1984); *NLRB* v. *State Plating & Finishing Co.*, 738 F.2d 733, 736-738 (6th Cir. 1984); *Mosey Mfg.* v. *NLRB*, 701 F.2d 610, 615 (7th Cir. 1983) (en banc). The courts are also uniform in holding that the Board's findings concerning whether allegedly improper conduct has actually occurred should be judged under the "substantial evidence" standard. See, *e.g.*, *NLRB* v. *State Plating & Finishing Co.*, 738 F.2d at 736-738; *Mosey Mfg.* v. *NLRB*, 701 F.2d at 613-615 (7th Cir. 1983); *Jamesway Corp.* v. *NLRB*, 676 F.2d 63, 67-68 n.5 (3d Cir. 1982). The only point on which they differ is whether the Board's ultimate decision that alleged misconduct is or is not sufficiently coercive to warrant the setting aside of an election should be reviewed under a substantial evidence or abuse of discretion standard. Compare *Mosey Mfg.* v. *NLRB*, 701 F.2d 610 at 615 (substantial evidence standard); and *N.L.R.B.* v. *L & J Equipment, Inc.*, 745 F.2d at 231 (same) with *NLRB* v. *S. Prawer & Co.*, 584 F.2d 1099, 1101 (1st Cir. 1978) (abuse of discretion standard); *Schneider Mills, Inc.* v. *NLRB*, 390 F.2d 375, 387 (4th Cir. 1968) (same). See also *NLRB* v. *Big Three Industries, Inc.*, 602 F.2d 898, 901 (9th Cir. 1979) (treating abuse of discretion standard as synonymous with

lack of substantial evidence in this context); *Bausch & Lomb, Inc.* v. *NLRB*, 451 F.2d 873, 876, 877 & n.6 (2d Cir. 1971) (same); *LaCrescent Constant Care Center, Inc.* v. *NLRB*, 510 F.2d 1319, 1324 (8th Cir. 1975) (same).

This case is not an appropriate vehicle for resolving the difference. Petitioner does not contend that a different result would have obtained in this case had the court below applied one standard of review rather than the other standard of review. Indeed, petitioner reads (Pet. 7) the decision below (as do we) as evaluating petitioner's claims under both standards of review and as finding that the Board's order was enforceable under either standard. Since the outcome of this case would not be affected at all by the choice between possible standards of review, the case is plainly not an appropriate vehicle for making such a choice.[8]

3. Petitioner mischaracterizes the decision below in suggesting (Pet. 12-14, 14-15) that the Sixth Circuit held it to an incorrect standard of proof. Contrary to petitioner's suggestion, the court below did not hold that an election may be overturned only on the basis of evidence that coercive acts interfered with employee free choice. The court had no occasion to consider whether an election could be overturned on the basis of " 'other elements which prevent or impede a reasoned choice' " (*ITT* v. *NLRB*, 712 F.2d 40, 45 (2d Cir. 1983) (citation omitted)), because petitioner alleged only that certain conduct, including

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[8] Petitioner's assertion of an intra-circuit conflict in the Sixth Circuit, even if true, provides no basis for review by this Court. See *Wisnieski* v. *United States*, 353 U.S. 901, 902 (1957).

the racial slurs, was intimidating of employees (Pet. App. 28a, 29a).[9] And, again contrary to petitioner's suggestion, the court below assessed the record as a whole in determining that substantial evidence supported the Board's conclusion that petitioner had failed to show that the election in this case was conducted in an atmosphere that impeded free and reasoned choice. Petitioner's real complaint is that the court affirmed the Board's finding with respect to these issues,[10] but such fact-bound questions raise no issue warranting review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

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[9] By contrast, in *ITT* v. *NLRB*, 712 F.2d 40, 44 (2d Cir. 1983), it was alleged that promises of benefits made by pro-union supervisors had improperly influenced the election's outcome. Similarly, in *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 70 (1962), it was alleged that appeals to racial prejudice as a reason for voting for one party in the election had impeded free choice.

[10] Thus, petitioner claims (Pet. 15) that the court below "failed to address the fact that substantial evidence * * * ignored by, the Hearing Officer * * * included an employee's advance knowledge that pro-Union employees planned to plant marijuana in the truck of a black employee who opposed the Union and the fact that Ku Klux Klan references and racial slurs were made on Company truck radios after the filing of the Petition." But the "evidence of advance knowledge" to which petitioner refers is Curry's testimony concerning a statement by the blacktop operator, testimony that the hearing officer refused to credit and thus was rejected by both the Board and the court below. See Pet. App. 33a-34a, 20a, 6a-9a. Likewise, the hearing officer, the Board, and the court below evaluated the testimony concerning the alleged racial "slurs" and all found that, even if credited, it did not establish that the election was conducted in an environment that impeded free choice. See *id.* at 31a-34a, 20a, 6a-9a.

4. Petitioner similarly errs in contending (Pet. 15-17) that, in light of the Board's decision in *Davlan Engineering, Inc.*, 283 N.L.R.B. No. 124 (Apr. 30, 1987),[11] the Court should grant certiorari to address whether the employees who handed out authorization cards were agents of the union. While the hearing officer did hold, in the alternative, that the employee statements concerning fee waivers were not attributable to the Union, neither the Board nor the court below reached this issue since they found that the alleged employee statements were never made. See Pet. App. 20a n.1, 6a. Thus, the question that petitioner asks this Court to resolve is not at issue in this case.

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[11] In *Davlan*, the Board, reversing prior precedent, held that "in the absence of extraordinary circumstances, employees who solicit authorization cards should be deemed special agents of the union for the limited purpose of assessing the impact of statements about union fee waivers or other purported union policies that they make in the course of soliciting" (slip op. 6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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